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CONSULTANT REGISTRATION AND REFORM ACT OF 1989

HEARING

BEFORE THE

SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE, AND CIVIL SERVICE

OF THE

COMMITTEE ON GOVERNMENTAL AFFAIRS UNITED STATES SENATE

ONE HUNDRED FIRST CONGRESS

FIRST SESSION

ON

S. 166

TO IMPROVE CONTRACTING PROCEDURES FOR PROCUREMENT OF ADVISORY AND ASSISTANCE SERVICES BY THE FEDERAL GOVERNENT, AND FOR OTHER PURPOSES

NOVEMBER 17, 1989

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CONSULTANT REGISTRATION AND REFORM ACT OF 1989

FRIDAY, NOVEMBER 17, 1989

U.S. SENATE,
SUBCOMMITTEE ON FEDERAL SERVICES,
POST OFFICE, AND CIVIL SERVICE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 9:35 a.m., in room SD-342, Dirksen Senate Office Building, Hon. David Pryor, Chairman of the Subcommittee, presiding.

Present: Senators Pryor and Stevens.

OPENING STATEMENT OF SENATOR PRYOR

Senator PRYOR. Good morning ladies and gentlemen. I appreciate all of you being here this morning. I think some of our colleagues will be joining us later. The Senate is having a unique meeting at this time. I guess you would call it a private meeting, where we are discussing ethics, whether to have a pay raise or no pay raise, honorarium, sequestration, reconciliation, adjournment, Thanksgiving, Christmas, New Year's, et cetera. After that meeting concludes, it started at 9, perhaps some of our other colleagues will come over and join us.

Today we are going to receive testimony on an idea that has been near and dear to me for almost a decade, and that is consultant registration. In 1981 I originally introduced a bill on this subject. I have reintroduced legislation in the past two Congresses. Last fall I successfully offered a consultant registration amendment to the DOD Appropriations bill. The Office of Federal Procurement Policy, OFPP, will be unveiling its draft final policy letter today.

I realize that this is a first step, and I think a major first step, in this area. I know that regulations must follow. I am pleased by OFPP's reports and their efforts. We have held a number of hearings over the past 2 years, I believe we are up to seven now in this area. However, this is the first hearing to focus specifically on the legislation and how a consultant registration plan should be designed and implemented.

For years people have asked me what I am really trying to do, what am I trying to accomplish in all of this? Well, frankly, all I am really trying to do is to increase accountability, cut unnecessary spending, and shed a little sunshine into this very mysterious world of consulting and contracting. To do this we must determine

who is running the Government. I am sorry to have to report to you this morning that it appears that our Government is no longer being managed by Federal officials, but that the responsibility has been increasingly abdicated to private consultants, to private contractors and to lobbyists, and in a manner that is more costly to the taxpayer.

Two weeks ago this Subcommittee held a hearing that examined the way in which the Department of Energy and the Environmental Protection Agency rely on these private concerns. These agencies use consultants and contractors for virtually everything they do. For example, we discovered, at DOE contractors are routinely used in the preparation of congressional testimony. In an Alice in Wonderland situation DOE uses a contractor to run its administrative hearing process for disputes involving security clearances. This turns the world upside down in many respects. It means a contractor has the responsibility for hearing an appeal from a Federal employee who feels he or she has been wrongly denied a security clearance.

In addition, this contractor reviews other contractors' appeals of clearance denials. At DOE where so much of the work revolves around sensitive nuclear weapons facilities, denying a clearance could make or break someone's career and could ruin the chances of ultimately winning a contract. This delegation of an inherently governmental function must be addressed.

The Government spends billions and billions of dollars on consultants and contractors. Many of these contracts are sole source with no competition whatsoever. We find that many are involved in what I have always called the "buddy system," not what but who you know. The Office of Management and Budget has estimated that the Government spends somewhere between $4 billion and $26 billion on these services. The Government has come to rely on contractors and consultants to perform almost every job conceivable, including some of the most sensitive work of our Federal Government.

These problems cannot be solved overnight. They require Congress and the Executive branch to evaluate what our Government has become and decide whether to continue this pattern or whether changes now must be made. However, there is one issue that can and should be addressed immediately, and that is the registration, the simple registration and disclosure of those contractors and consultants who provide sensitive services to the Government. We must know who these contractors and consultants are. We must know who their other clients are.

This is not a new or novel idea. It has been used in other situations in which Congress recognized that potential for problems. For example, Government officials must file disclosure forms to ensure they have no potential conflicts of interest, as do members of the Federal advisory committees like the Defense Science Board. People who lobby Congress are required to register with Congress and provide information on who they represent and basically how much they are being paid. People who represent foreign countries or companies have to register with the Department of Justice and reveal who they are working for, what they will be doing for the foreign entity, and how much they are making for that service.

The basic policy behind all of these requirements is very simple, it is basic. We recognize that in certain situations private interests have the ability to influence Government policy or actions. Their influence extends far beyond the reach of most private citizens in our system. The use of contractors and consultants by the Government represents just such a situation. I believe it is a golden opportunity for us now to move forward. I am asking no more from Government contractors and consultants than has already been asked from many other groups.

Over the past few years we have witnessed former Government officials trading on their access to the highest legal of our Government. We have seen the results of the Ill Wind investigation unfold. We have watched as bigger and bigger problems have materialized at the Department of Housing and Urban Development.

Why do we have to wait for another scandal to develop? Why can't the Government take steps to fully inform itself and the public about the people with whom it does business before a problem develops and we see front page headlines?

I think consultant registration would do just that. It would give agencies complete information about consultants and contractors. It would allow the Government to make informed decisions about the firms that they hire. And finally, it would allow the public and the Congress to have this knowledge.

I look forward to hearing from our witnesses today. We will hear from certain individuals who have spent a considerable amount of their time and resources looking at these problems and identifying solutions which are desperately needed.

I would now like to call our first panel. The first witness is Mr. Whitney North Seymour.

Mr. Seymour, if you would please be so kind as to come to the witness table. Mr. Seymour was the independent counsel for the Michael Deaver case. He presented a very intriguing, and I must also say alarming, report to the Congress entitled "Executive Branch Lobbying." I put this report in the Congressional Record back in September, when this report was made available to us, and I am also going to put that same report in the hearing record.[1] I think that it should be disseminated to the public in every manner in which we can so do.

This report outlines deficiencies in current law which allow Executive branch employees to be lobbied secretly. In fact, Mr. Seymour terms this "back channel" Government and calls for some sunshine in this very murky world. Having reached a similar conclusion myself when faced with a shadow Government, I look forward to hearing his views, as I know all of us do, on the benefits of registration and disclosure.

Our second witness, who will be joining Mr. Seymour, is Mr. Frank Keating. He is the General Counsel at the Department of Housing and Urban Development. After HUD's recent problems, Secretary Kemp proposed a package of reforms to address many of the problems identified by the agency, its Inspector General and the Congress. One of the proposals was in fact consultant registra-

[1] See p. 106.

tion. I look forward to hearing from Mr. Keating about HUD's registration proposal and hope to have the opportunity to work with him in the future on this.

First, let us turn the microphone over to Mr. Seymour. Mr. Seymour, we appreciate your being here. Thank you.

TESTIMONY OF WHITNEY NORTH SEYMOUR, JR., BROWN & SEYMOUR, NEW YORK, NY

Mr. SEYMOUR. Thank you, Mr. Chairman.

Woodrow Wilson was fond of telling a story about a fellow who was doing construction work on opening a window into the cellar of a building, and as he was working at the job a passerby stopped and said, "Say, my friend, what are you doing there, letting in some sunshine?" And the workman said, "No, I am letting the darkness out."

Whichever way you look at it, Mr. Chairman, I have no doubt at all that opening more windows into the process of Government is an absolutely crucial function, and I am here very strongly to support your legislative objectives.

I am here as an advocate of public registration of private persons and firms who are paid to influence the operations of the Federal Government. My concern as a former independent counsel relates to indirect influence on governmental operations through the lobbying being of executive agencies, but those concerns equally apply to persons who directly influence governmental operations as paid contractors and consultants.

Since none of these people are directly answerable to the electorate, not being public employees, ways must be found to open up their activities to the taxpayers who pay the bills for the Government operations that are being influenced. Secrecy in Government breeds abuse in Government. When people believe that no one is watching they are capable of conduct and decisions that they would never attempt out in the open. The concept of open Government is founded on long popular distrust of quiet deals and secret bargains. What may be appropriate to private business is not acceptable in a representative Government. The Biblical admonition, "And ye shall know the truth and the truth shall make you free," could well be the motto for democracy. Truth is the fodder of freedom. Citizens make decisions based on what they know. In a democracy they are entitled to know exactly what their Government leaders are doing and why.

Open Government is the basic philosophy behind the constitution's First Amendment, the Freedom of Information Act, the Securities and Exchange Act, and many other fundamental laws of the Nation. The Michael Deaver investigation would never have begun if two newspaper reporters had not discovered the Deaver firm's registration with the Justice Department of its contract to represent the Government of Canada. That registration was required by law because Canada is a foreign Government and its lobbying agreements must be reported under the Foreign Agents Registration Act, known as FARA.

As independent counsel I urged Congress to bring Executive branch lobbying out into the open where it will be subject to public

scrutiny. Extend the FARA filing requirements to domestic lobbying clients as well as foreign. Eliminate secret back channel Government where rich and powerful interests can get the private ears of Government officials with nobody else listening.

If that one change can be accomplished, our entire effort in the Deaver case will have been worthwhile. If that one change can be accomplished, much of the need for independent counsel in the future may perhaps be eliminated. Violation of filing requirements can be handled routinely by regular Justice Department personnel. The key is to deter misconduct by the public disclosure of lobbying activities.

What good is registration? Properly performed, it carries out two major functions. Number 1, in most cases it makes standards of conduct self-enforcing. Registration does not depend on the energy or astuteness of some administrative employee serving as a watchdog. The registrant does the policing itself by committing information to paper. If sufficiently precise factual information is asked for, facts cannot be left vague to be slid over or forgotten. Criminal sanctions against false statements compel the registrant to disclose requested information fully and accurately—the written record will exist for a long time. The statute of limitations keeps the possibility of prosecution open for years.

Not only must the registrant's information be truthful, but disclosure serves to discourage improper conduct. Things that might be done when nobody is watching are no longer appealing under the glare of public disclosure. Where a conflict of interest exists, for example, and must be fully disclosed in writing by the registration of a consultant, the chances are that the registrant will simply withdraw its contract proposal, or take other steps to correct the problem.

Number 2, the public itself oversees the process and can blow the whistle if something is wrong. By the public, of course, I primarily mean the press. With public registration and reporting, journalists no longer need to depend entirely on leaks or official investigations to dig up wrongdoing. If questionable conduct must be reported, newsmen can find it for themselves. As soon as there is a whiff of political favoritism, bill-padding or fraud, the news media can go directly to public filings for leads on who to call up and what questions to ask.

While I commend the direction of your legislation, I do have some suggestions on how to strengthen the present registration proposals from an enforcement point of view. Number 1, in framing registration and reporting requirements, the important thing is to ask for facts—who, what, where, when. Put yourself in the position of a journalist. What facts would you want to know in order to check out whether everything is on the up and up? This includes, for example, some indication of the dollar amounts of consultant contracts so they can be evaluated in terms of their economic significance and impact.

Number 2, registration records must be open to public inspection and copying, or self-policing will not work. Simply depending on agency personnel to review filings is not enough. The natural tendency of administrative personnel is to protect against scandal and

stay clear of rocking the boat. The independence of the press is the public's real protection.

Number 3, there must be centralized sources of registration data for easy access by the press and the public. Hiding registration records in cubbyholes scattered around the District of Columbia only discourages public oversight. In the computer age there is no reasonable justification for not collecting data electronically in at least one central place, or even making it available at several data collecting points.

Effective registration and reporting requirements are the keys to public disclosure of governmental operations. Public disclosure is simple, self-enforcing and a healthy preventative. Probably most important of all, public disclosure helps restore public confidence in the fairness and integrity of the Federal Government.

Thank you, Mr. Chairman, for the opportunity of being here.

Senator PRYOR. Mr. Seymour, I very much appreciate your contribution to this hearing.

I am going to call on Mr. Keating and then I will ask both of you some questions and perhaps we can engage in a little colloquy. I do have some specific questions, and let me also say how much we appreciate your recommendations for what we should include in the registration of consultants.

Mr. Keating, we welcome your statement.

TESTIMONY OF FRANCIS A. KEATING II, GENERAL COUNSEL, DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Mr. KEATING. Mr. Chairman, I appreciate the opportunity to appear before you to discuss Secretary Kemp's legislative approach to insuring that consultants and others do not unfairly influence HUD's decision-making process.

As you know, Secretary Kemp inherited a Department that was deeply embedded with problems and controversy. Many of these problems came to light in reports from HUD's Inspector General. The Subcommittee on Employment and Housing of the House Committee on Government Operations, chaired by Representative Lantos, and the media helped expand the public's knowledge of the mismanagement which Jack Kemp discovered at HUD. Fraud, waste and abuse among those who did business with HUD were found to be all too common. Without change, the Department stood in danger of becoming paralyzed, unable either to carry out its mission of serving lower income families, or to set a clear agenda for meeting the Nation's housing and development needs in the 1990s.

Secretary Kemp's solution was to call upon the best and brightest at HUD to come up with initiatives, both legislative and administrative, to deal with these problems. He requested that I serve as chairman of that effort. The result was a reform bill that was sent to Congress on October 31, 1989 and has been introduced in the Senate as S. 1841. The package contained 27 separate provisions. Taken together, they offer a comprehensive approach to insuring that the abuses the Department experienced during past administrations will not recur. Some of the most important ethics initiatives, Mr. Chairman, are in line with your three-prong test to in-

crease accountability, to reduce spending, and to put public decision-making in the sunshine.

First, a proposal to institute fair and open competition for Federal housing funds. Second, a proposal to require public notification of all discretionary funding decisions in housing assistance allocations. Third, a requirement that all waivers of regulations be published in the Federal Register.

These initiatives show the Department's efforts to encourage sunshine on as many aspects of HUD reform operations as possible. Toward that goal, the HUD reform package also contained a consultant reform initiative. Many of the most disturbing recent revelations involved allegations that housing grants has been awarded to certain developers who paid huge fees to politically connected consultants and lobbyists who did little more than open doors and place a few phone calls. These consultants received as much as $1,500 per unit to arrange funding awards in advance of public notice.

Consultants were used extensively, accounting for about one-fifth of all units funded since October of 1983. Twenty different consultants received payments in excess of $5.7 million for lobbying services on 51 individual projects. Of course, we also want to point out that there are many types of consultants—those in Government acquisition, as you have mentioned—many of whom do render valuable services to the Government.

Although the payment of such fees may not have violated current law, Secretary Kemp believes that public disclosure of any fees paid to consultants would help stop these excessive payments. Therefore, Jack Kemp's consultant reform proposal approaches the problem with a sensible two-pronged approach aimed at keeping HUD's decision-making process free from improper influence.

First, disclosure. Anyone making an expenditure to influence a departmental decision regarding a management action would be required to disclose those expenditures. We agree in that respect with Mr. Seymour.

Second, registration. Consultants, lobbyists and lawyers who attempt to influence departmental funding or management positions, such as the imposition of sanctions, would have to register with the Department. In that respect we also agree with Mr. Seymour. Both types of reports would also be published in the Federal Register.

The Secretary would have the authority to impose civil monetary penalties up to $10,000 for each failure to register or disclose to serve as both a punishment and a deterrent. This authority would be in addition to any other criminal or civil remedies available.

The proposal contains a flexible threshold, recognizing that some consultant involvement may be within reason. Persons who spend or receive less than $5,000 in any calendar quarter and less than $10,000 in any Federal fiscal year to influence a departmental decision would be exempt from the reporting and registration requirement. For example, this would allow consultants to public and Indian housing authorities to provide necessary technical and professional assistance to public housing authorities without subjecting either the PHAs or consultants to the requirement of this section.

I might add, Mr. Chairman, parenthetically, that the Byrd amendment, which is, as you know, the law, does provide that these expenditures cannot be out of Federal funds. Our approach is a tad different from that. We certainly support the Byrd approach, which is equally strong in making sure that Federal monies are not frivolously used for the purpose of advancing the financial interest of any private person.

Also excluded from the provision would be the payment of reasonable compensation made to regularly employed officers and employees of the person who requests or receives assistance within the jurisdictions of the Department or who is involved in any management action with respect to such assistance. We believe that the approach for dealing with lobbying strikes a proper balance among legitimate and competing concerns. The bill does not seek to bar lobbying activities. This reform recognizes the fact that certain forms are lobbying are not only acceptable elements of our political system, but necessary to the smooth and fair functioning of our Federal system.

Instead, our proposal relies for its effect on the old axiom that sunlight is the best disinfectant. Those who wish to turn persuasion into influence peddling will do so at their peril. They will surely know that their activities will be revealed for all to see, including program administrators and prosecutors who may seek further criminal, civil and administrative sanctions.

Indeed, the saddest commentary of all is that there is every likelihood that the influence peddling the Department suffered through may not have ever happened if the simple concepts in Secretary Kemp's proposals had been in effect earlier.

I would be happy to answer any questions that the members of this Subcommittee or you have, Mr. Chairman.

Senator PRYOR. Mr. Keating, thank you very much.

Mr. Seymour, during the course of the next few minutes we may be using the name of Mike Deaver quite a bit, and I want you to know that I am not doing that to reopen old wounds. I think the Deaver case has been publicized sufficiently, but I also think that the Deaver case is one which gives us an insight into how the system works. I think we can take the Deaver situation, dissect it, and see what happens when someone is hired and paid enormous fees by private sources to lobby or attempt to influence in the Executive branch of the Government.

My first question is this, not necessarily related to Mr. Deaver's situation. After your investigation and your work in this area, what is the difference that you might see in lobbying the Legislative branch versus the Executive branch? Is there a distinction there that any legislation should try to address?

Mr. SEYMOUR. Well, the obvious distinction as of right now is if you lobby the Legislative branch you have to register and disclose it, whereas if you lobby the Executive branch it is free wheeling behind closed doors.

In terms of the nature of the lobbying activity, I can see some distinctions. Plainly, the congressional process is one where there is pretty much an obligation to hear from all interested parties. In the Executive branch, although one has to be receptive to constructive suggestions, the need to actually grant private audiences to

the powerful but not to those representing the public interest is one of the severe distinctions I think. You have got to figure out a way to discourage special access. It seems to me that public disclosure with some detail is more required in the Executive branch than it is for the Congressional branch.

The present Congressional registration requirement does not require a detailed statement of who you went to see and what you attempted to accomplish.

The FARA requirement does compel you to put down dates, times and places of who you went to see. That I think is a valid distinction on the Executive branch level, because you need accounting as to who the door is being opened to. The elected Senator or Congressman, just by the nature of the fact he is answerable to his constituency, is going to make darn sure that his constituency gets in to see him. But the appointive deputy secretary of this or that may be much more interested in seeing people who have been major contributors to the presidential campaign than in seeing, say, tenant groups, consumer groups or what have you.

Senator PRYOR. You made some suggestions, and once again, we appreciate those suggestions. Let me read some of the requirements under my legislation that would be required for a consultant registration section. It would apply to consultants who provide advisory and assistance services directly to the Government, or to prime contractors, in the preparation and submission of bids.

First, the bill would make a contractor ineligible for the contract award unless he or she had registered with the agency and provided a copy of the registration to the contracting officer. Now, I know that you have stressed the need for centralizing a lot of this information. Conceptually I strongly agree with you, but this is the requirement under my proposal. The consultant would provide: his name and address; a description of the service or services provided by the consultant; a description of the nature of the consultant's clients; a list of all clients, public, private, U.S., foreign, to whom the consultant had provided services directly related to the contract in question within the past 3 years; a statement as to whether the consultant has ever been convicted of a felony or is under indictment; a statement as to whether the consultant is currently suspended or debarred by the Government from contracting; a certification that the consultant is not in violation of the revolving door statutes which now exist; and finally, a certification that the consultant does not have a conflict of interest in this matter.

Now, should we add on to this anything that you can think of?

Mr. SEYMOUR. My concern, focusing on the conflict of interest aspect of the problem, is with the portion of the registration requirement that deals with existing contracts or past contracts with other clients. That, it seems to me, is where the real potential evil is here. Having run up against it in the context of the Deaver case, albeit there lobbying as opposed to direct contracting, it is self-evident that when you have a private firm their principal reason for being is to maximize income, not to serve the public interest, albeit they may contract to do things in the public interest. But their motivation has to be to serve stockholder interests or ownership interests.

Therefore the pressure is always there to try to use one contract to help build other contractual relations. And so it is not just past events, it is also future events, and it is the nature of those contractual relationships that really is the tipoff of whether you have got a problem.

So I would suggest that the registration requirements on past contracts or ongoing contracts in the same field—plainly it has to be relevant to the subject matter—should have details of the amount of the contract and some kind of description of the nature of the contract. There ought to be a requirement that if the reviewing officer asks for it that they be provided with a copy of the contract so they can see if there in fact is a direct overlap. There ought to be some information as to who the responsible contracting officer is and how he can be reached so that not only, again, the agency personnel can check out to see whether the disclosure is full and frank, but also the media as representative of the public when something begins not to look right has a phone number to call up and say I would like to find out some more about the contract you have with X Y Z, who has got a half a billion dollar consulting contract with the Defense Department, for example.

So it is that kind of factual information as opposed to generalities that seems to me the crucial element. Now plainly, it should not be overwhelming and it should not be burdensome, but it ought to be basic factual information. That is certainly one of the areas that I would concentrate on.

Senator PRYOR. Admiral Watkins, the Secretary of the Department of Energy, DOE, testimony to the House and Senate in his confirmation hearings, as well as his briefing to the National Press Club on certain DOE policies relative to weapons plants operated by the Department of Energy, were written in their entirety by BDM. BDM is a major defense contractor.

Admiral Watkins did not even know that the statement he read to the committees in Congress was prepared by anyone except Federal employees under him. He had no knowledge until only 2 or 3 weeks ago that BDM had prepared his testimony.

This to me is astounding. We had another situation, and you have touched on an area that this Subcommittee has investigated. We made, I hope, the public aware of this. We took DOE and EPA and dissected these two governmental agencies. At DOE we found that a company had advised the Department of Energy on US/Japan nuclear nonproliferation treaties while at the very same time this company listed in its annual report that it was working for the Japanese Ministry of International Trade and Industry and the Tokyo Electric Power Company.

DOE did not give the Congress nor the public any notice of this. We had to go out there and dig it out. It took weeks to do, but it was a fact and it was undisputed.

We have created a very incestuous relationship. The Agency for International Development has reached the point where that contracting officer may himself or herself be a private consultant.

We find agencies throughout the Federal system, I don't know about yours Mr. Keating, where in the same office we have the Federal personnel and the private contractors working almost at

the next desk. I suggested that maybe one ought to wear a blue arm band and one a red arm band to see——

Mr. SEYMOUR. Or a white hat or a black hat.

Senator PRYOR. Or a black or a white hat. Now, to me, what we have in the Federal Government is a few services still performed by the Federal employee, but many, too many, sensitive functions being contracted out.

Now, I am just hopeful that Mr. Keating's statement this morning was not prepared by a consulting firm.

Mr. KEATING. I better check into that, Mr. Chairman.

Senator PRYOR. It may have been.

Mr. KEATING. We don't have that problem. As you can well imagine from your own review of the facts at HUD and the public recitation of those facts, our problem isn't so much the consultants on the inside, it is consultants on the outside trying to get in.

Senator PRYOR. And those are two different issues.

Mr. KEATING. That's correct.

Senator PRYOR. Mr. Seymour, did you have any comment?

Mr. SEYMOUR. However, many of the problems are similar in kind. You know, a consultant who has an inside track has an asset as far as other potential clients are concerned. That is plainly a way to get the ear of the agency that you are interested in influencing. If you can get the consultant that is working with that agency, indeed who is actually performing in an operational way, what better route is there to getting something done that you want done?

Let me give you two examples from the actual trial of the Deaver case that will illustrate quite dramatically the problem that you have just identified, the speech writing example. Ordinarily one—particularly if you are a citizen not part of the Washington scene—one rather assumes that speeches are written by speech writers who are directly loyal to the person they are writing for and who are concerned about how to deal with issues of public interest, and that is really almost a sacrosanct process.

Well, one of the things you learn very quickly when you get into the lobbying realm is that speech writing is one of the real points where you can influence rational policy. If, for example, you can get the President or the Vice President of the United States to insert a paragraph in a speech that says "This Administration supports X," you suddenly have a weapon you can take to the administrative agencies, to the Congress, to anybody, and say, "Look, our side won."

I will give you a specific example. Mr. Deaver represented a firm that was helping the Commonwealth of Puerto Rico, which in turn was helping the major pharmaceutical companies in the U.S. preserve a tax loophole that was to be repealed in the Tax Reform Act. A lot of work went into trying to get that loophole back into the legislation. Ultimately the Administration support for that loophole came out of the mouth of the then-Vice President of the United States, George Bush, in a speech made to the Governors meeting in Miami, Florida. And the paragraph that he read expressing the Administration's support was originally drafted by one of Mr. Deaver's lobbying clients. And Mr. Deaver himself had been

instrumental in making sure that that language was included in the speech.

Now, I am certain that the Vice President had no notion at all who wrote that paragraph, but I am equally certain that the Administration became committed from that point on to support that tax loophole, undoubtedly for good and sufficient reasons from their point of view, but still the process is a chilling one.

There is another institution here that I noticed in the account of Admiral Watkins, and what that consultant actually boasted that they were doing was affecting "talking points." You know, for us simple country people from outside of the Nation's capital, "talking points" is an unfamiliar concept. Most people we think of as talking for themselves, but you soon discover down here that public officials are very busy people and so in the limousine going to a meeting, or in the two minutes before somebody comes in, they are handed these talking points with bullets that tell you what to say.

Well, you get the lobbyist or the consultant's other clients' point of view behind one of those bullets and you have suddenly committed an executive to a position that he probably never gave any thought to but his staff put before him and so he articulated the point.

Speeches and talking points are very vulnerable areas in terms of public policy, and without public accountability as to who is putting the information in there, you have a very serious problem.

I have got one other example, and that is on your Japan situation. Mr. Deaver was convicted for perjury in connection with the following transaction. He arranged for a trade representative of the Republic of South Korea to have an audience with then-President Reagan in the Oval Room. He did it through contacts in the National Security Council to whom he was a former colleague and a friend. He never told them what he was up to. He simply said it would be in the interest of better trade relations and international relations between our countries if the President would see this fellow from South Korea.

What nobody knew, including the President when the representative of South Korea handed him a letter purportedly from the President of South Korea, was that Mr. Deaver's office had in fact drafted the letter which had then been finalized for the President of South Korea and then delivered, through Mr. Deaver's intercession, to the President of the United States. The result of which was a few days later Mr. Deaver was awarded a $475,000 contract by the Government of South Korea. Another fine example of how a private enterprise interested in increasing its revenue can do something in its Government contact to improve its own situation with a paying client.

Senator PRYOR. Is this cashing in on friendships, is that basically the bottom line?

Mr. SEYMOUR. That is the simplest statement.

Senator PRYOR. You know, Mr. Seymour, I have been absolutely fascinated in reading your report about how the system works. It was an eye opener to me. Was it an eye opener to you or were you aware of the types of fees that were paid to individuals for making say a phone call? Were you aware of this before or was this a revelation?

Mr. SEYMOUR. No, I was stunned and, frankly, sickened by it.

Senator PRYOR. I used to practice law, and I would get paid in turnip greens and chickens, you know, and sweet potatoes sometimes. So that was pretty amazing to me. But this was basically a revelation to you and to your staff?

Mr. SEYMOUR. And a very distressing one, too.

Senator PRYOR. Mr. Keating, we are in the wrong business, after reading about these fees. For example, TWA hired Mr. Deaver for awhile. He made one phone call to the Secretary of Transportation; he made one phone call to presidential assistant Roger White. He got a fee of $250,000. That's $125,000 a phone call.

Here on page 21, Mr. Deaver met privately with Secretary of the Treasury James Baker at his home; met and talked socially with National Security Advisor Robert McFarland in the White House; met and talked privately with Secretary of State George Shultz, fee, $200,000.

Here with Boeing Mr. Deaver got a fee of $250,000 for having breakfast with White House military official General Matthew Caulfield, at the Four Seasons Hotel. There was another meeting in Mr. Deaver's office, he made an informational phone call to Mr. Dennis Thomas, Deaver's successor in the White House, $250,000; and on and on and on.

Now, what I would like to know, Mr. Seymour, did these individuals that Mr. Deaver was talking to at that time, did they realize who Mr. Deaver was working for?

Mr. SEYMOUR. In many cases no.

Senator PRYOR. Did they realize that they were attempting to be influenced by Mr. Deaver?

Mr. SEYMOUR. In many cases no, and that, of course, is why registration and disclosure is so vital. You really have to know, when you are dealing with these private interests, who they are carrying water for, whose interests are they advocating. And it seems to me both the public official is entitled to that protection and the public itself is entitled to that protection. And, of course, that's the genius behind the proposal that Mr. Keating has been describing. The problems that he is dealing with trying to prevent from recurring were very similar in kind. The fees might not have been as high because they were slightly lower echelon lobbyists, but the principle was exactly the same.

Senator PRYOR. Mr. Keating, in a few moments we will hear from a group that represents a lot of the consultants, and I will be interested in their comments on what OFPP and HUD is doing today. But let me ask you, if I might, would the HUD proposals on registration and disclosure differ significantly from those that will be offered later by OFPP?

Mr. KEATING. Mr. Chairman, I apologize, I have not familiarized myself with all of the specifics, but there is a common thread I know between our view, I think their view, certainly the Byrd view, and that is that it is time that all of this be out in the open and let the public and the Congress decide whether or not this conduct is acceptable.

I might say as a postscript to what Mr. Seymour said, we had revelations of six phone calls for $300,000 from former Secretary Watt in attempting to influence a decision at HUD. Would that

have happened if this registration requirement was in effect? I don't think it would have. I think that you would have had, and I think you will see, a more legitimate relationship between the fee paid and the service performed.

I just can't imagine that if people knew that all of these things would be subject to full public revelation and scrutiny, that the thousand dollars per unit—and these are in some cases $300,000 properties in toto—but $1,000 per unit fees simply would not be sustainable.

Senator PRYOR. So you have not had an opportunity to review the OFPP proposal?

Mr. KEATING. No, not in any detail.

Senator PRYOR. Well, the reason I asked that is because I really congratulate HUD and Secretary Kemp on what you are attempting to do on disclosure. I do think it has got to be beyond HUD. I think it has got to be Government wide. And I hope some day we can come to a centralized bank of information.

I held a hearing, I guess it was a year or 2 ago, about a very nondescript little agency in the bottom of the State Department with, I think, about seven or eight employees. Their function is to approve or disapprove licenses for individuals to become weapons dealers and to give them licenses to sell overseas. I will never forget, Senator Mitchell was at the hearing that day and he asked, how many do you grant? I think the answer is about 46,000 a year.

The second question Senator Mitchell asked was, do you grant these licenses to convicted felons? The director of the office says, you know, I don't know, I just don't know that answer, I guess we do, we don't have any records as to whether they are felons or not when they apply for these licenses.

They just stamp them and approve them. But once again, disclosure, Mr. Seymour, would certainly bring a lot of sunshine into this Government.

Now, one argument, Mr. Keating, that has been made by the consulting industry is that this is just going to generate mounds of paperwork. I wonder if you would address yourself to this, not only your proposal but OFPP and consultant registration generally. Do you have a comment?

Mr. KEATING. Well, Mr. Chairman, I think Mr. Seymour said it very well when he said that what should be attempted is to generate facts that are relevant, not simply to generate facts. And I think that in the case of our own consultant registration proposal, what we are interested in is finding out, again, the name of the individual, the nature of the work, what the fee is, and what specific things are being done in order to earn that fee. Information that is factual information that would assist us in deciding whether or not administrative action should be taken if the bottom should fall out of the facts; whether there, as a result of other conduct, could be criminal or other civil sanctions sought.

And I think what we would hope, of course, is whatever comes out of this hearing, or any hearing that attempts consultant reform, is that we attempt to restrict ourselves to relevant facts and not simply things that are gossipy. That is very difficult to identify, Mr. Chairman, obviously. Gossip for some people is relevant facts for others. But we think anything that would assist our

department, for one, in making our decision to get at the facts of the particular consultancy—why, when, where, as Mr. Seymour has indicated—would be very beneficial and we would hope the bill would contain that language.

Senator PRYOR. Mr. Keating, most of my 10 years of effort in this field has been looking at contractors and consultants hired by the Government, paid for with Federal taxpayers' dollars to perform a service or a function. To a large degree in the Watt case, I think I am correct in saying this, as is in the Deaver case, we had a situation where they were not paid directly with taxpayers' dollars but by private interest dollars.

Now, does your proposal affect the consultants working directly for HUD, paid for by the taxpayer to perform a service?

Mr. KEATING. No. Our proposal, Mr. Chairman, only affects those people who pay money to affect HUD's decisions, not HUD going out and hiring a consultant or a contractor to help us.

Let me make one comment about the Watt matter, not that this specifically applies to Secretary Watt, but it has been suggested that these fees that were paid were private fees, therefore there wasn't an issue. In the case of many of the HUD programs, the amount of subsidies that the Government provides related to a number of factors—cost factors, expense factors—those cost and expense factors we found did include these consultancies.

So it was an indirect benefit with Federal funds—not direct, but an indirect benefit. So it is true that the private party paid the private party, but the Government subsidy paid the private party to pay the private party.

Senator PRYOR. All right, let's assume that HUD, one of your contracting officers, signs a contract with ABC consulting firm to perform a service. Let's say the fee is $100,000. HUD starts using up this pool of $100,000.

Do you today have any way to know if that particular ABC consulting firm also works for a private interest that might have a conflict with that relationship?

Mr. KEATING. No, we do not.

Senator PRYOR. No cross-checking?

Mr. KEATING. No. And as you well know, absent some kind of encyclopedia, dictionary, whatever you want to call it, some kind of information that would permit you to learn that, you are not going to know that. And I think that to the extent that we could know those things, it would be very helpful. Because we are in the business now of attempting to restructure a shattered department, and going out and attempting to find people to help us reexamine our management structure, reexamine our field organization, reexamine our computer systems, we would certainly like to be able to know that these people are solely loyal to us and not to someone else in the course of that enterprise.

Senator PRYOR. Well, I am almost certain in saying this, that the OFPP proposal, and I must say that I think about 95 percent of this is lifted from legislation that I have introduced, I think would correct this and would for the first time supply this type of cross-checking of information. At least that's what the purpose is, because this country is getting in real danger if we do not know who

we are paying to work for us, and especially if we do not know who else they are working for.

It is simple. It is called working both sides of the street. Today we don't have access to that information, and it is pretty unbelievable that we don't. I am not just talking about HUD, Mr. Keating, I am talking Government-wide. I don't know whether we don't want to know it or whether the Government agencies just turn the other way, or say that's too confusing, or certainly contractors would not be involved in a conflict of interest in this situation. But I think the idea of self-policing has not worked and I think the proposal we are going to talk about in a few moments, hopefully, will.

Senator Stevens, I am so proud that you are here, and we welcome you.

Senator STEVENS. I have just dropped by—we have the defense bill on the floor. I have noticed your new proposal. I would be happy to discuss it with you, but I unfortunately cannot stay today.

It does seem that—and I have noticed in looking through Mr. Seymour's statement and the little brochure he put out—there has to be some differentiation between Executive lobbying and the practice of law, doesn't there, Mr. Seymour?

Mr. SEYMOUR. I am not sure I understand the question, Senator.

Senator STEVENS. Well, you mentioned in your report several instances where people who were lawyers are also Executive lobbyists. Don't you draw a line between the two?

Mr. SEYMOUR. In terms of the registration requirements? Absolutely not. The way you do it, of course, is by having—and this really addresses the Chairman's question too—by having threshold levels of when you have to report. What my report addresses is really these, if you please, scandalously high-fee kind of lobbyists. I am not talking about the people who do the professional work that really makes Government run. You are not talking about the regular paid employees of the national associations that represent absolutely legitimate constituencies.

You are talking about the people who, in the old fashioned phrase, "fixer" almost applies to. Now, they are not people who come in with bundles of cash, they are people who come in with bundles of cronyism and are being paid outrageous fees simply because they can get back door access.

Now, if it is a lawyer who is doing that, he should register too. If it is a lawyer just doing ordinary work that you and I would think of where you bill by the hour for the work you perform, the chances are you are not going to meet the fee threshold, and so it becomes academic.

But the moment that lawyer's time starts getting the multiple hundreds of thousands of dollars, I think the public is entitled to know about it.

Senator STEVENS. Well, you know, I have been practicing law in or out of Government for 40 years now and it just seems to me that there is a nice fine line there. I think some of the fees that Washington lawyers charge are out of line to start with.

Mr. SEYMOUR. Do you have any notion, Senator, how many nonlawyers are now affiliated with Washington firms to do lobbying work and to bring in the lobbying business? That is really part of

the problem. The practice of law in Washington is not country law practice, it is quite a different animal.

Senator STEVENS. Well, I understand that, but it does seem to me that there is a nice distinction. I am thinking of small companies that have reason to have representation here, they hire a law firm, they think they are getting a lawyer and now you are going to have them register as lobbyists. Suddenly they go into another category. I am going to have to examine that issue because I think there are some instances where it is really less expensive for small businesses based out in the rest of the country to hire a representative here. And I don't know why these small businesses automatically should be put in a category of having hired an executive lobbyist because their lawyer is getting paid to represent them here.

There has got to be some distinction. I understand the fixer problem. If you are dealing with fixers, I am with you, but if you are dealing with the problem of having everyone who seeks a representative in Washington having to lobby, that will be to me about as effective as the reports we receive under the Congressional Lobbying Act. I don't know if the Chairman has ever read them. I have never read them all the way through, have you?

Mr. SEYMOUR. I have read a number of them, and I agree on the whole they are not very informative.

Senator STEVENS. Well, it is just a piece of paper and suddenly 20 years from now somebody will say, well, he was a lobbyist, or a company had a lobbyist in Washington. And it is because they file all these papers, which make no difference. I would rather have tougher laws as far as the ethics of the profession than to have a bunch of lobbying reports that are filed that don't mean anything except that a group is listed in some paper as having an executive lobbyist, or a Congressional lobbyist.

Mr. SEYMOUR. I think it is the nature of the work you do that determines whether you have to register, and if in fact the lawyer is holding himself out as a lobbyist with the Executive branch, it seems to me it is only right that that should be fairly disclosed.

Senator STEVENS. Well, I wish I could stay, but Mr. Chairman, I congratulate you. Once again you are going into a very difficult area.

Senator PRYOR. And it is murky.

Senator STEVENS. And it is murky. If you can you draw fine lines through the murk, I will be glad to try to help you. Thank you.

Senator PRYOR. Well, you have been a very cooperative colleague, Senator Stevens, and thank you very much for coming this morning.

One final question, Mr. Keating. What advice would you give for people in similar positions in other departments and agencies of Government so we might avoid the Ill Winds or the HUD scandals that we have seen revealed? What advice might you give your counterparts?

Mr. KEATING. It is interesting, Mr. Chairman, you would mention Ill Wind. During the last of the Reagan Administration I served as the Associate Attorney General, the number 3 person at Justice, and supervised that case. So I had the experience not only in the Defense Department but HUD.

I think the first thing that the Cabinet Department should do is read the Inspector General's reports. As a matter of fact, when Secretary Kemp came, that is the first thing he did, was go through the Inspectors General's reports, which are legion with suggestions of, if not criminal impropriety, at least improprieties, conflicts of interest, concerns about conduct, policies and practices.

And the second thing, after we read those reports, was to attempt to implement the decisions, the recommendations of those reports. There are lots of them, and there is a lot of stuff in them. We also think that the Inspectors Generals should be more aggressive as auditors. In effect, to be point men out there, moving ahead of the problem attempting to identify potential problems as opposed to simply attempting to clean up the mess after the fact.

But we think the best starting place for every Cabinet Department in this Government would be to start reading the Inspectors General's reports and implementing those recommendations where appropriate.

Senator PRYOR. Now that you have brought up Inspectors General, in the mail just last week I got this nice little publication, and one my very efficient staff people looked at it. I am not alleging anything wrong, but I find it unique. This is from the Leonard G. Birnbaum Company. They are retained by many of the Inspectors General. We have found out at the same time they also teach courses. You can take a course from this company which is hired by the IGs, paid by the taxpayers, to learn how you rebut DCAA's position during negotiations, techniques to rebut the Federal auditors, and how contractors can safeguard information rights and remedies.

Now, it sounds to me like they are representing their own interest here and not the interest of the Inspectors General who are to protect the taxpayer. Here is, to me, an example of what we have been talking about. I hope you will see if your Inspector General is retaining this particular firm.

Mr. KEATING. I will certainly look into it, Mr. Chairman. It sounds like a full-service bank.

Senator PRYOR. There are thousands of cases just like this. This one just happened to come in the mail, and they will probably now take me off the mailing list.

Mr. Keating, we appreciate your coming, and Mr. Seymour. Would either of you have any final comments?

Mr. SEYMOUR. Only to say, Mr. Chairman, the public owes you a great debt for keeping this fight going for so long. I hope you are getting close to final realization of your objectives.

Senator PRYOR. Well, in a moment OFPP will give us some encouraging news, really for the first time, because every time I have held a hearing with whichever agency of Government, a new administration, a new OMB director, you name it, they say, "Senator Pryor, we are getting ready to make some changes."

Well, I haven't seen any changes except for the worse in the last 10 or 11 years, but maybe, because I am an optimist, we are going to see some. But we are going to stay on this issue. I think it is very critical to the functioning of our system, and now we are delegating that function to private contractors, and many of those private contractors and consultants have a potential conflict of inter-

est. And they are being paid very well. It has demoralized a great portion of the Federal work force. The Federal employee sees his neighbor at the next desk maybe making 2 or 3 times what their salary is.

Consultants are not covered by any conflict of interest laws, as the Federal employees are. We deal around here all the time, as I have said before, with whether to give the Federal worker a 2 percent raise or a 3.6 percent raise, and we debate that for months. We never have any discussion on how much these private consultants and contractors are being paid. It is a major loophole in our system that has intrigued and concerned me for a number of years, and I know both of you are concerned as well.

You have both been very constructive and we appreciate very much your coming today. Thank you.

Our next panel will be Mr. Allan Burman, Acting Director, Office of Federal Procurement Policy, OMB, accompanied by Mr. Richard Ong, the Deputy Associate Administrator.

We welcome both of you. You are no strangers to this Committee, and we sincerely appreciative your coming today to give us this testimony. I will have a few questions when you conclude.

TESTIMONY OF ALLAN V. BURMAN, ACTING DIRECTOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET,[1] ACCOMPANIED BY RICHARD ONG, DEPUTY ASSOCIATE ADMINISTRATOR

Mr. BURMAN. Thank you very much, Mr. Chairman, I am very pleased to be here today.

Senator PRYOR. Let me say, Mr. Burman, I understand that you have very recently been nominated to become the permanent director of OFPP, and I would like not only to offer my congratulations but my heart-felt condolences, because I know that your job is not going to be easy.

Mr. BURMAN. I think I thank you for those remarks. I should probably say at the outset, I am receiving no special fee for appearing here this morning as well.

I am the Deputy Administrator and Acting Administrator of the Office of Federal Procurement Policy and I have been very honored that the President has nominated me for this position. I am pleased to be here today to discuss our Policy Letter as well as to make some comments on S. 166, the Consultant Registration and Reform Act of 1989. I would like to introduce my companion, Richard Ong, who is an attorney in our office and a Deputy Associate Administrator and who has been working with me for a long time on this particular policy document.

If I may, I would like to submit my statement for the record and briefly summarize it.

Senator PRYOR. Your full statement will be placed in the record, Mr. Burman.

Mr. BURMAN. Thank you very much. What we have tried to do in this document is to set out an approach that avoids conflicts while at the same time trying to minimize the paperwork and record

[1] See p. 61 for Mr. Burman's prepared statement.

keeping burdens associated with the Policy Letter. And we are concerned about preserving the confidentiality of sensitive business information. Our proposed Policy Letter, as you know, was published for comment in June, and we have now reviewed all of the comments on that letter, and I have attached with my statement a copy of what we believe to be our final version of this document,[1] and we plan to have the letter formally published very shortly.

The 1989 Defense Department Appropriations Act required us to set out policy for, one, those providing advisory and assistance services directly to the Government, and then also for those providing consulting services to prime contractors on bids and proposals. For the purposes of our Policy Letter we call the letter "marketing consultants."

The law also states that we should provide such, "registration, certification and enforcement requirements as may be appropriate, to promote compliance with such standards."

Now, once the letter does come out there will be a 6-month period for the regulation writers to actually put the regulations in place that will cause this to take effect. We recognize that during a lot of the discussion on this issue the Ill Wind investigation was going on. We saw that members were very concerned about the lack of information on consultants, and their clients as well.

We see now with Ill Wind, however, that the people involved in that appear to have violated clear provisions of the law. I just recently heard Henry Hudson speak about this case. He called it "fraud and bribery, pure and simple." So I am not sure that the Policy Letter that we develop is necessarily going to deal with that particular kind of a situation.

Now, if I may, I would just like to go into the major features of the Policy Letter. What we did, rather than try to create new definitions, was to use, as the basis for a conflict of interest definition, a 1977 Energy Department statute—a law that was passed by Congress and signed by the President. It defined "conflict" as a circumstance where a person is unable to render impartial advice because of some existing relationship, or where a person is given an unfair competitive advantage.

So these are the two prongs of our test for a conflict, and our approach basically relies on disclosure to the Government of contractor activities.

The key features of the Policy Letter are as follows. It requires certifications to the Government. These certifications have to be provided on a contract-by-contract basis by the firm that is the apparent successful offeror. It affects directly those people who are providing advisory services to the Government. It also affects those people who are providing marketing consultant services to prime contractors.

We rely heavily on the contracting officer in this process, and he is ultimately the one who makes the decision on whether a conflict exists and whether that conflict is such that a firm would have to be declared ineligible to receive an award. Giving this responsibility to contracting officers is something that we think is very impor-

[1] See p. 75.

tant from a Government-wide acquisition policy standpoint. I think we need to try to do what we can to upgrade both the quality and the responsibilities of those people in Government who are given this important task.

We set out a mandatory preaward review for contracts, and we do that to sensitize both the contracting officers on conflict of interest situations, and also contractors from whom we require certifications. It makes them aware of any conflicts that might exist and forces them to face that issue directly.

We offer some flexibility in the Policy Letter. We allow discretion on the part of the contracting officer and allow him also to look at ways to try to mitigate a conflict if some conflict is found.

There are other enforcement measures as well. Clearly a firm can be found ineligible to receive an award. There are criminal sanctions, as you know, for false statements that are provided to the Government, and we believe, as other people speaking here earlier have said, that this whole disclosure effort will have an effect on people making judgments as to whether or not they want to employ consultants and for what purposes they employ them. So we see that as a side benefit.

We have set thresholds. The thresholds are similar to what you have proposed in your bill. We are proposing a $25,000 threshold for those people providing direct advisory and assistance services. With regard to marketing consultants, the threshold is for the prime contractor, and we provided a $200,000 threshold. However, there is no threshold for the marketing consultant who is working for that prime contractor.

Senator PRYOR. Under your definition, what is a marketing consultant?

Mr. BURMAN. Based on the definition in the law, a marketing consultant is someone who is providing bid and proposal support to a contractor. And I believe that the effort there was to look at those people who were providing information to contractors that then might be used in helping them to get a contract, as well.

We don't have a firm requirement for a central registration in here. What we say is that agencies may impose such a central registration if they see fit. But we believe that we are getting the effect of disclosure by requiring a certification process and documents to be provided to the Government. That is a difference between where we are and what you have suggested.

Now, we did receive many comments, as you can expect, on our draft Policy Letter, and we did make some changes to that as a result of those comments. We were asked to define an "unfair competitive advantage." We didn't do that in the earlier document. And there, we have looked to the issue of someone's getting privileged information and improperly using privileged information. We think that our definition really provides adequate guidance to people as to what shouldn't be done.

We had deleted engineering and technical services in our first Policy Letter, arguing that these are technical activities and really shouldn't be under the coverage. We have received some comments that raised issues with that, and frankly, that is a very difficult kind of a question. We have reinstituted or reinserted engineering and technical services to the coverage, but we have stated that rou-

tine engineering and technical services shall not be covered. And that is perhaps something that will require some further discussion and debate.

Clearly what we are looking at here are those kinds of services where there is potential for abuse and a likelihood that there is considerable discretion in the kind of advice that the Government is being given. Also, as a result of comments that you made, Mr. Chairman, we made other changes. We originally put in a provision that said that firms that have appropriate ethics standards shouldn't be required to make the same disclosures as others. I think you had concerns that disclosure was what we were looking for here. I know many of the industry people were concerned that we would be setting up what would be acceptable standards of conduct, and given those comments, we deleted those provisions from the draft.

And finally, another point that you had raised, there was a very broad agency head waiver in the original provision. We have tightened that up considerably. Now we are saying only the agency head can make that decision, and he can only make it on a contract-by-contract basis. So we are not providing an opportunity for vast exclusions from coverage for certain kinds of contracts.

There were other recommendations made to us that we did not accept. A number of people, and you as well, have raised questions about the A-120 definitions. We have raised the same concerns and we have testified here on that problem as well. However, we think that trying to come up with a new definition would only add more confusion to the process, and so we will hopefully get that A-120 definition straightened out. This Policy Letter states that it will rely on the A-120 definition. So I think that will be an adequate way to deal with that issue.

People were concerned about the thresholds, feeling that they were too low in many cases, and were concerned about burden. I think that the thresholds are reasonable. They are above the small purchase level for Government contracts for services. Many services are provided at levels $25,000 and above. I think that these are appropriate, so we have made no modification to them.

Another question raised was whether any firm that bids on a contract should provide all of this information. Again, for purposes of trying to minimize the burden, we said the apparently successful offeror will be the one who will actually perform the certification, because he is the one who is going to be getting that contract.

That really is a very quick summary of the policy document. Obviously I could go into some detail on any additional parts of that. If I may, I might just take a minute or two to talk about S. 166.

In general, I think we have very similar approaches. Our Policy Letter is more confined than all of the information required by S. 166—the additional budget information and the requirement for evaluation of consulting efforts, for example. Of course, A-120 does require these things. And, as I already mentioned, there is a difference with regard to registration.

In conclusion, Mr. Chairman, this has been a very quick accounting of our Policy Letter. We recognize the very important efforts you have made to reexamine the role of consultants. We spend lots of money on consulting services and they provide valuable services

to the Government, but we all want to be sure that the advice the Government is getting is objective and is not motivated by some idea of gain for the firm.

We also want to see that any regulations that are promulgated are necessary and impose the least burden on the Government and the contracting community. We believe that our Policy Letter carries out the Congressional direction in a reasonable fashion and meets these tests. However, I have read your report on the Department of Energy situation, particularly where you look at the conflict of interest issue, and I do have to say that our Policy Letter will only be as effective as those people who are out there trying to carry it out.

Mr. Chairman, this concludes my prepared remarks, and I would be happy to answer any questions.

Senator PRYOR. Mr. Burman, thank you very much. I want to salute you for addressing this problem and bringing out this new proposal. In fact, I am so encouraged about it I will give you a copy of a letter that I am today sending to President Bush asking him to support your proposal.[1] I think it is a major step forward. I would say that, frankly, you don't go quite as far as I would like to go. I would like to have a centralized bank of information. I think we can discuss that at a later time.

Also, just for your information, and I know you know this, I will be watching very closely the implementation. I will be looking at the public comments. I will be examining that process very carefully, because the implementation is going to be critical, as is the depth of the commitment of OFPP. Your actions will be interpreted by the various agencies, the contracting officers who are looking at this, and it is going to be a major change in the way people do business with the private contractors and consultants.

It is also going to be a major revelation, because for the first time we are getting ready to see who else these folks work for. That is critical, and that goes to the very core of what this hearing is about, and basically what this issue is about, which is who is running the Government. We are seeing who is going to be employed and who else they work for.

Let me ask one hypothetical question. I was sitting here thinking about our recent DOE hearing. Let me give you a hypothetical. DOE has a Fossil Energy Division to provide support for clean coal, coal combustion, and coal conversion technologies for industry, utility, and residential applications. The contractor that is applying to get into this field and to assist DOE, and also to make a lot of money out of it, also performs extensive work for utilities and energy companies. That is the situation.

Now, would your proposal send up a red flag if that particular proposal came in to DOE?

Mr. BURMAN. I would have to look at the exact details, but it seems to me that there would be a case where someone would be reporting that they are working for these other companies because it would be directly related to the subject matter at hand for what they are working for in the Government. Now, the only question

[1] See p. 104.

that might be at issue is whether they are providing advice to the Government, discretionary kind of advice or a routine kind of a technical service. That would be the one issue that one might raise. But I would believe it would be covered.

Senator PRYOR. You think that would send up the red flag?

Mr. BURMAN. I think it would be covered to the extent that the contracting officer would then want to know what are the kinds of services that are being provided and whether or not there is likely to be some advice that is going to be colored by other motivations than to do what the Government wants.

Senator PRYOR. All right. Let's go to a real life situation that involved a foreign country. I will revisit the situation where DOE hired a particular company to advise them on certain Japanese-U.S. agreements on nonproliferation. If that company also represented major utility companies in Japan, would that send a red flag through the system?

Mr. BURMAN. I think that would absolutely be covered by the provisions, and in fact we specifically point out that any work being done for a foreign government has to be provided.

Senator PRYOR. By the way, that was a relatively small contract. DOE paid the contractor, I think, $100,000. I say relatively small, that is still a lot of money, however, that contractor probably would have paid DOE $100,000 to be in that situation of representing both interests at the same time, or at least having their foot in the door.

I am going to have to conclude this panel. Mr. Ong, do you have any comments? I would be welcome to hear anything.

Mr. ONG. I would just like to put in a plea for the Federal employee, Senator. It was pointed out that Admiral Watkins had had testimony prepared for him and so forth, and I think it is important to bear in mind that Federal officials are people who do exercise independent judgment and that there is a filtering process information goes through, even in those cases where they may not know where the information is coming from.

I think it is appropriate for us to put a lot of trust and reliance in their judgment and their experience so that when they run across something—even though they may not know the origin of it—they are still capable of assessing it as being something of value or something that is questionable, and I think that is an important safeguard.

Senator PRYOR. Well, I want to keep that safeguard. My fear is we are losing that safeguard. That is my real concern. I am very fearful that those responsible, talented Federal employees are being drained out of the system and going to work for the private sector where they can increase their income.

I just don't want to see the Federal system drained of that degree of responsibility, nor do I want to see us abdicate the responsibility to the private contracting world. We will have to discuss this some day, because what I am seeing is pretty startling and I think we are going to see more before it gets better.

We are going to have a 10-day period for members of the Committee to submit questions in writing to you and other panelists, and we would appreciate a response as soon as possible.

We thank you both of you. Once again, Mr. Burman, we wish you well and we thank you for this proposal that you advancing today.

Mr. BURMAN. Thank you very much, sir.

Senator PRYOR. We will call our final panel this morning. We are now going to hear from Mr. Philip Odeen, representing the Professional Services Council. Mr. Odeen is accompanied by Mr. William Morrill. I must tell you, I have gone back to hearings I held back on this issue I think in 1980, 9 years ago, and I found out that the Professional Services Council was there. I look forward to hearing your testimony today. I hope we can move faster on the issue now than we have over the past decade, because I have not seen a great deal progress. Maybe you differ in that judgment, but we look forward to your statement this morning.

TESTIMONY OF PHILIP A. ODEEN, PROFESSIONAL SERVICES COUNCIL, ACCOMPANIED BY WILLIAM A. MORRILL [1]

Mr. ODEEN. Thank you, Mr. Chairman. I am Phil Odeen. I am the Chairman of the Professional Services Council. I also serve as the managing partner of the Washington consulting office for Coopers & Lybrand, a large international accounting firm. I am accompanied by Bill Morrill, the President of Mathtech a member company in PSC and also a member of our board. I might point out that Bill just finished serving as Chairman of the Council for Excellence in Government, an organization that is very active in efforts to improve pay and other compensation for Federal employees and officials as well as to encourage better people to come to the Government and to stay with the Government. They have made a major contribution on issues like the pay raise.

The Professional Services Council represents well over a hundred companies firms and associations. They include independent labs and test facilities, program analysis and evaluation companies, architect and engineering firms, computer software development and systems integration firms and public accounting firms.

I should point out that the kind of services we provide, and this is one of our concerns are very different kind of services than the so-called "influence peddling" we have been hearing about today. We often get tarred with the brush of being such consultants when we are doing very different things, and very important things—very different from the sorts of issues that our first two speakers discussed this morning.

Senator PRYOR. Let me just interrupt there, Mr. Odeen. I am not looking for criminals this morning. In fact, I have no power to go out and search or prosecute criminals.

What I am looking for simply is disclosure from those people who deal with our Government.

Mr. ODEEN. We greatly appreciate the chance to testify on this topic. In discussing my testimony with your staff, we agreed in my written statement to focus not so much on the OFPP policy or your recent proposed legislation, but rather to address some of the un-

[1] See p. 91 for the prepared statement of Mr. Odeen and Mr. Morrill.

derlying problems that we believe are central to the issues that you have been raising for these many years.

There is a great deal of common ground between ourselves and your position, Mr. Chairman, on such matters as upgrading the Federal work force through improved pay, recruitment, retention and training, the need for a better understanding of the proper relationship between in-house capability and use of outside consultants, the need to refine organizational conflict of interest standards and to disclose relevant information, and finally, to come to grips with the Government's efforts to define what professional and technical services are and control and manage them more effectively. We agree that these issues are important and we want to help you come to grips with them.

First, let me talk about the issue of pay and compensation and work conditions for Federal employees. In many ways, Mr. Chairman, the issues you have raised really flow from the fact that because of pay and other reasons the Federal Government is not able to attract and retain the kind of people it needs and has been forced to go to the outside for assistance. We want to join with members of Congress and the Administration who are looking for ways to attract and retain the very best people as Federal employees and to staff properly and manage these kinds of Government activities you have been talking about today. We are interested and concerned about these problem. Indeed, we confront them on a day-to-day basis in our dealings with Government procurement officers and Government officials of all types.

The Government in fact faces a real dilemma. At a time when developments in new technologies, especially in information and telecommunications are accelerating, Government agencies are finding it harder and harder to recruit and retain highly qualified individuals. Not surprisingly, these high tech areas are an important and growing element in Federal services procurement as new technologies, professional disciplines and way of doing businesses are introduced at a breathtaking pace.

We believe that extraordinary measures are needed immediately to enhance and maintain the Government's essential management and technical capabilities. We do not pretend to have a perfect solution, but we believe the primary factors that attract and motivate people must be addressed at a very fundamental level. We see four areas where we believe changes are needed if we are going to reverse this talent drain.

First, we have to correct the pay problem, especially at senior levels. The Federal pay gap at senior levels is a true national crisis, and we were pleased, of course, to read of the House's action on pay reform yesterday and we sincerely urge the Senate to approve the pay proposals which are now being considered.

But the probelm goes beyond pay comparability. There are other compensation issues as well, ways to reward merit, promote the best performers rapidly and provide financial incentives for outstanding performance.

Second, we believe that recruitment and retention matters deserve greater priority. The Government needs to mobilize its efforts to claim its share of the talent if we are going to have an effective Government structure.

Third, we believe we need to provide greater challenge and opportunity in the workplace. Many very talented men and women will pursue Government careers despite pay disadvantages if the work is exciting and rewarding. If the Government is to provide these challenges and opportunities, especially for people in the acquisition field, we must resolve the growing frustration of Federal employees in dealing with the ever more arcane and complex regulations which minimize the opportunities to use judgment and skills in their area of responsibility, forcing them instead to focus on numerous procedural hurdles and paperwork demands.

And finally, we need to reevaluate the steady politicizing of the Federal service. Senior jobs that were once open to the career force are now routinely filled by political appointees.

The current environment drives away the best and the brightest, it diverts attention from basic missions, discourages innovation, initiative and good judgment, and over emphasizes attention to detailed and prescribed procedures. Mr. Chairman, we think this entire problem of keeping good people in the Federal service is very relevant to the concerns that you have raised over the years.

Closely related to the need for capable management and technical staffs is another fundamental public policy issue, what is appropriately a Government function and what is a private sector function? PSC believes that policy determination and decisionmaking functions must be retained by the Government and exercised by Government employees. PSC also believes that technical and managerial direction of Federal programs, financial management and regulation are functions that should be performed exclusively or at least predominantly by Government employees.

However, there is a subtle dimension to this simple principle which requires careful consideration and treatment. In both defense and civilian agencies, professional and technical services firms provide important services and sometimes critical help to Government employees in fulfilling their agency missions. This assistance includes data gathering and analysis, research, analytical and evaluation support, developing policies and implementing strategies and programs. We believe this is an appropriate and effective use of our value-added services as long as the ultimate policy decisions are made by the Government.

Mr. Chairman, I would now like to turn to the problem that we know is of real concern to the Subcommittee as well as to the professional and technical services community, that is, organizational conflict of interest. The problem of conflict of interest has been a matter of concern both to the Government and to the consulting community for many years. Regulations in this area have been on the books for several decades and new laws and regulations have been passed or promulgated in recent years. Yet no one is happy with the present situation.

We recognize that possible conflicts of interest is a consideration in today's acquisition process. It must be dealt with in a responsible and constructive manner that benefits both the Government and the contracting industry. Responsible companies do not want to be involved inadvertently in a conflict of interest situation. The penalties to the company financially, the implications for its reputation and integrity, impact on employee morale and sense of pro-

fessionalism, give the company ample incentives to avoid conflicts of interest.

As we are all aware, the issue of conflict, whether an actual conflict or a perceived one, is a complex subject. Even more difficult is the process of attempting to separate those situations where an actual conflict of interest exists from those where there is an appearance of conflict but where in reality no conflict exists. The complexity of today's weapons systems and Government programs, coupled with the requirements of the Federal acquisition process, make it difficult to define situations that pose real or potential conflicts of interest.

In our opinion, individual tailoring by competent acquisition personnel is the best way to avoid real or perceived organizational conflict of interest. It has been our experience that case-by-case tailoring of organizational conflict of interest clauses protects both the Government's and the contractor's interest very adequately and seldom results in a problem.

The issues are too complex and depend too heavily on exact circumstances to rely on legislation or regulation to spell out potential conflicts in detail. Only sound, informed judgments by Government personnel will work well in practice.

While broad and general principles of conflict of interest can be set forth in legislation and regulation, the specific information needed to determine conflicts of interest can be determined best in relation to the specifics of a particular RFP. The requirement should be part of the Government's RFP and the response a part of the bidder's proposal.

Mr. Chairman, the Subcommittee has also expressed much interest and concern regarding how professional and technical services are managed by the Federal Government. Underlying these lines of inquiry is the unresolved and contentious issue regarding how the Government defines professional technical services and subsequently manages those services and controls the financial resources applied to them. Unfortunately, there is no coherent universal definition of professional and technical services within the Federal Government. There are several disconnected and sometimes conflicting descriptions in tracking systems, such as OMB Circular A-120, Defense's PB-27, the Federal Procurement Data System, and finally, the recently created Standard Industrial Classification Group Number 87.

We strongly support the improvement of basic economic and statistical data as a long term, ongoing, and evolutionary process. The information is invaluable both to the Government and the private sector in assessing industry-wide developments, analyzing areas of growth and developing policy options that impact the competitiveness of U.S. companies in international markets.

We believe it is feasible to create a single comprehensive and coherent definition and information system for professional and technical services. Ideally such a system would respond to the Government's planning, programming, budgeting and procurement functions and improve internal management within Federal departments and agencies.

Ultimately, the only way to create such a system may be by legislative mandate. Responsibility for coordinating the development

of such a system should be assigned to an interagency task force with an input from the private sector and implementation assigned to a single Executive agency. We certainly endorse Mr. Burman's comments about the problems in A-120 and we are looking forward to working with him in trying to clarify that document.

Senator PRYOR. Mr. Odeen, I want to apologize to you. I am wanted on the telephone and I am going to be gone 60 seconds.

Mr. ODEEN. Okay. I have completed my statement Mr. Chairman, and I look forward to answering your questions.

Senator PRYOR. Fine, I will return in a moment and then I do have a few questions.

[Brief pause.]

Senator PRYOR. Now, are you through with your statement?

Mr. ODEEN. Yes, sir. We appreciate the chance of being here today and we look forward to working with you, other members and your staff on these issues.

Senator PRYOR. Mr. Odeen, one thing that concerns me a little bit is the individual case-by-case tailoring concept that would require you to have to basically ferret out and avoid the potential conflict of interest. I will be honest with you, I just don't think that is going to work. I just think that we are going to need a more comprehensive plan. I think the contractors and the contracting officers want and need to know what the rules are, and I think it leaves it too subjective and up to the whims of the contracting officer to really get down and require this case-by-case tailoring.

Would your association, for example, object to what OFPP has proposed?

Mr. ODEEN. No, Mr. Chairman. We have been through the proposed policy statement. We have made a number of comments, some of which they have accepted, some which they have not. But the basic outlines of what they propose we think we can live with. It is a burden on us. It is going to involve cost, time, money and effort to comply. But on balance it is a positive step and we believe they have done a good job in trying to make it as easy to comply with as possible and certainly we have no sharp disagreement.

Senator PRYOR. Let's say, for no better descriptive term at this time that I can come up with, that you are today speaking for a major portion of the consulting industry; would that be correct?

Mr. ODEEN. Yes, sir. But we represent much more than consulting firms. We provide a wide range of professional and technical services in R&D and engineering, and so it is more. Consulting is often used very broadly, but most of us think of it as being a much narrower kind of service. We have consultants, but also have engineers and scientists and research people and a broad range of professional people providing, high technical content services.

Senator PRYOR. All right, if you say you support OFPP's proposal today, does that mean that this is a change in your stance, let's say over a year, or 2 years ago?

Mr. ODEEN. Last year, Mr. Chairman, we both testified before the House Armed Services Committee—in fact, you testified earlier in that hearing. We opposed the particular rider to the Defense Appropriations bill, for several reasons. We felt that the immediate problem was not with our industry. Rather the problem was marketing consultants and the kind of individuals discussed by the pre-

vious speakers and that the legislation and regulations should be focused on that element because they were the real problem.

We also were very concerned that the initial amendment would have been very onerous to comply with. The amount of information that would be provided, the difficulty providing that, the cost providing that we were concerned about, and we were also concerned about there being proprietary knowledge that would be of advantage to our competition—and we are in a very competitive business, I might point out—would be divulged. And therefore we had real questions about it.

Now, we think the amendments that were made in conference and the final policy that came out is something that we can support, Mr. Chairman.

Senator PRYOR. I wanted to tell our two previous panelists that even though I am writing the President today in support basically of what OFPP is doing at this moment, I am still not absolutely certain that we might not by statute enact that plan as well as some other safeguards. I am going to keep that option open, and I will be following that implementation process during the next several months.

Mr. ODEEN. Could I comment on your tailoring question, Mr. Chairman?

Senator PRYOR. Yes, certainly.

Mr. ODEEN. You raised that and then we got off on something else. I think we all are very concerned about organizational conflict of interest. In fact, as a prerequisite to being a member of the Professional Services Council we have a code of conduct which our members have to subscribe to, and it has a fairly specific set of requirements regarding organizational conflict of interest, and it makes it very clear what our members must do to avoid that. We are confident that most firms in this business are quite careful about organizational conflict of interest.

But deciding whether something is a true conflict or an apparent one is a very difficult matter. Let me just give a couple of examples. I was thinking as I was listening to your statement earlier, that my firm does a lot of work with the Defense Logistics Agency——

Senator PRYOR. What agency?

Mr. ODEEN. The Defense Logistics Agency. They run a number of payment centers that pay bills to contractors, and they have had a lot of difficulty in paying the bills promptly. They asked us to come in and help them get their files in shape and work on their procedures to allow them to process checks more expeditiously. We have been helpful to DLA, both in terms of doing cleaning up contract files and improving their procedures.

It has been suggested, in fact, by some of the officials we are working with that we might provide similar help to Government contractors. If they would submit the bills in better order, the Government can process the information and quickly pay the bills.

Now, some people might look at that and think this is a terrible conflict of interest. On the other hand, it is our perspective and also the Government's perspective, that this helps both the Government and the contractor. To decide whether this were a conflict would require a contracting officer to look in some detail at the

specifics of what it is we are doing for the Government, what it is we are proposing to do for the private client, and decide whether this is a conflict or whether it is something that is really to everyone's benefit.

It is a difficult thing to judge, Mr. Chairman, and we think it can only really be done by the contracting officer who knows the specifics of the contract at issue and can get into what it is the firm wants to do for someone else.

Senator PRYOR. I am not going to argue with you this morning about that, but I would make an observation. The contracting officer in that relationship with the contractor is one thing. The disclosure to the Congress and to the public is another. This is the area that is going to be my first obligation. If there is no conflict, that's fine. All I am after is disclosure. And then I think ultimately the Congress and the public may have to make that decision, but until there is disclosure, until all this comes up to the top, we are never going to know.

We are never going to know who the contracts are with or who else they represent, and this is something that I have fought for a long time and this is why I have sought registration. I think, by the way, we have made a major breakthrough this morning with OFPP and their recommendation, if the President will go along with it, and if it is properly implemented. If not, we will try it by statute.

Mr. Morrill, did you want to make any comments? I notice you have been fidgeting there.

Mr. MORRILL. I was just going to add perhaps one additional example I was struck by earlier. Knowing who else the contractors may work for is not generally known, although in my experience that often is something that contracts will require. I happen to be, as a small business, a subcontractor on a proposal with a rather large firm for a piece of work in the FAA where the work involved will help the FAA monitor the delivery of hardware for the new air traffic control system.

Understandably, the FAA was concerned that the proposers on that contract have a clean record with respect to the hardware vendors, and required not only the prime but the subs to disclose what contracts, in amount and nature, they had with the either actual or potential hardware vendors, and not only did it once but during the procurement process, which is still open, kept updating that information. They were fully informed as to who was doing business with whom. And so that does happen, Senator, in at least some of the contracts that I am familiar with.

Senator PRYOR. Mr. Odeen, do you have anything to add to that?

Mr. ODEEN. I think that is right. It is very common to have these kinds of discussions, and this was all prior to the OFPP Policy Letter and your legislation last year. These kind of issues were raised very explicitly and carefully. In most cases we find, in my experience at least, that these issues are raised. Now, perhaps they were not in HUD, but certainty most agencies do look at these things quite carefully.

Senator PRYOR. Is your industry waxing or waning at this time? Is in a growth pattern, especially as it relates to the Federal Government contracts?

Mr. ODEEN. We certainly over a period of time have waxed, but the last several years the businesses have flattened and I think most of us are expecting the businesses to be affected, particularly as the defense budget contracts. The Gramm-Rudman process also has affected our business in recent years. Our businesses have tended to flatten and I think we are expecting some decline. It is a very competitive business we are in, Mr. Chairman, and it is going to get more so I suspect.

Senator PRYOR. If it is very competitive, why are about 50 percent of all the contracts sole source?

Mr. ODEEN. In our area I just don't think that is correct.

Mr. MORRILL. I don't have a single one, Senator. There used to be some in the services arena, and particularly in the kind of research work that I have been involved with. In the late 1960s, early 1970s, there was quite a lot of sole source work around. It has simply gone away, and it doesn't exist in my world.

Mr. ODEEN. Mine as well. We have a fairly large consulting practice and a lot of contracts, and I don't think we have a single contract that is sole source. They are all competitive at this point in time.

Mr. MORRILL. I think Mr. Odeen and I would want to be understood that we don't regret the disappearance of sole source work. For those us who are in the field and pride ourselves in doing quality work, we would rather compete right straight up and go after the work. That's where we will do best. And further, I might say that those of you who believe that weak Government procurement staffs or technical oversight is a good thing for the industry, it is not. We desperately need strong people in-house procuring and monitoring those services. For those of us who deliver quality, we do far better in that environment.

Senator PRYOR. I am glad to hear you say that, Mr. Morrill.

Any final comments, Mr. Odeen? I think we are momentarily facing a vote on the Senate floor.

Mr. ODEEN. Mr. Chairman, one of our concerns in this whole area is again the burden on us and the burden on the Government contracting officer. Those of us, as Bill Morrill just said, who deal with contracting officers on a regular basis are deeply concerned by the growing complexity of the whole process and the difficulty the Government has in buying services and hardware. The whole process is slower, it is more cumbersome—issues the Packard Commission and others have raised. Therefore in looking at proposals such as the one we are discussing today, it is imperative that we be very careful not to further burden this process. It makes it less efficient; it frustrates to the individuals involved. We have to be very careful to make sure that the procurement process and procedures are workable.

But again, I would like to repeat my initial comment one more time, we think it is crucial that the Congress take steps to improve working conditions and pay so we can get really high quality people in these Government agencies. This is in our interest, it is in the public's interest, and we heartily support efforts in that regard.

Senator PRYOR. Well, in just a very few minutes we may partially make that decision when we vote on the pay raise.

Mr. MORRILL. We hope so, sir.

Mr. ODEEN. We strongly urge you to support it, Senator.

Senator PRYOR. If Senator's salaries were not included, that would be an easy thing to say. But those votes are always so sensitive.

I want to thank the PSC today for your testimony, and I want to thank you for being open minded about many of these matters. We are going to continue working with you. We are going to monitor closely OFPP and their activities in the process of implementing this proposal discussed today. I think that is a major breakthrough, and I want to thank you also for dealing with our staff up front and we appreciate that very much. At this time we adjourn the meeting. Thank you.

[Whereupon, at 11:32 the Subcommittee adjourned, subject to the call of the Chair.]

101ST CONGRESS
1ST SESSION

S. 166

To improve contracting procedures for procurements of advisory and assistance services by the Federal Government, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 25 (legislative day, JANUARY 3), 1989

Mr. PRYOR introduced the following bill; which was read twice and referred to the Committee on Governmental Affairs

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A BILL

To improve contracting procedures for procurements of advisory and assistance services by the Federal Government, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Consultant Registration and Reform Act of 1989".

SEC. 2. FINDINGS.

Congress makes the following findings:

(1) Federal procurement officials have not consistently complied with procurement laws, regulations, and

management guidelines in awarding contracts for the procurement of advisory and assistance services.

(2) Procurement practices relating to the procurement of advisory and assistance services do not (A) adequately provide for full and open competition, or (B) adequately prevent conflicts of interest.

(3) Information regarding the Federal Government's use of advisory and assistance services is not maintained in a manner that results in helpful or meaningful information being available to Congress, the executive branch, or the public.

(4) Federal Government agencies have not consistently complied with the requirement in section 1114 of title 31, United States Code, to include in budget justifications submitted to Congress the amounts requested for consulting services, and the Inspector General (and comparable officials) of such agencies have not consistently complied with the requirement in such section to submit to Congress certain evaluations relating to contracts for consulting services.

(5) Full and open competition in the Federal procurement process is consistent with the basis of the free enterprise system and enables the Federal Government to obtain maximum value for Federal procurement expenditures.

(6) The costs of performing governmental functions are borne by the taxpayer regardless of whether the functions are performed in the private or public sector.

(7) The integrity of the governmental process, especially when advisory and assistance services are used in the performance of governmental functions, requires disclosure of the use and role of contractors who perform such functions.

(8) Legislation and oversight is necessary in order to establish and implement consistent policies and practices needed for procurement of advisory and assistance services.

SEC. 3. POLICY.

It is the policy of the United States that—

(1) Federal Government policymaking and decisionmaking functions should be performed by accountable Federal Government officials;

(2) the procurement of advisory and assistance services should be carried out in compliance with applicable procurement laws and regulations; and

(3) Federal Government functions should be performed using the most economical means available while recognizing the inherently governmental nature of certain activities.

SEC. 4. DEFINITIONS.

In this Act:

(1) The term "agency" has the same meaning as is provided in section 552(f) of title 5, United States Code.

(2) The term "contract" means (A) any agreement, including any amendment to or modification of an agreement, entered into by the Federal Government for the procurement of property or services, and (B) any letter authorizing the provision of property or services to the United States prior to a specification of the compensation for the provision of such property or services.

(3) The term "contractor" means any person, including, in the case of a business organization, any affiliate of such organization and including any consultant and any organization of consultants, which is a party to a contract with the Federal Government.

(4) The term "report" means a written study, plan, evaluation, analysis, manual, or similar document, in draft or final form, which is prepared by a contractor pursuant to a contract with an agency and which is submitted to such agency or is submitted on behalf of such agency to any other agency. Such term does not include a billing document, invoice, or other

routine business transmittal made with respect to the contract.

(5)(A) The term "advisory and assistance services" means services described in subparagraph (B) that an agency acquires by contract from a nongovernmental source for the support or improvement of agency policy development, decisionmaking, management, and administration, or the support or improvement of the operation of management systems.

(B) The services referred to in subparagraph (A)—

(i) are management and professional services, the conduct and preparation of studies, analyses, and evaluations, and engineering and technical services; and

(ii) are furnished in the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance.

SEC. 5. MONITORING PROCUREMENTS OF ADVISORY AND ASSISTANCE SERVICES.

(a) CONTRACT AWARDS.—Before an employee of an agency awards a contract for advisory and assistance services for an amount of $25,000 or more on the basis of an unsolicited proposal, such employee shall transmit to the Inspector General of such agency or a comparable official, or in the

case of an agency which does not have an Inspector General or a comparable official, the head of the agency or his designee, a written notice of the proposed contract award. The notice shall include a description of the contract and the justification for the contract.

(b) CONTRACT MODIFICATIONS.—Whenever an employee of an agency modifies a contract for advisory and assistance services and the modification of such contract increases the amount of the contract by at least $100,000, such employee shall transmit to the Inspector General of such agency or a comparable official of the agency, or in the case of an agency which does not have an Inspector General or a comparable official, the head of the agency or his designee, a written notice of the modification. The notice shall include—

(1) a description of the original contract;

(2) a description of the modification; and

(3) the justification for the modification.

SEC. 6. IDENTIFICATION OF REPORTS PREPARED BY CONTRACTORS.

Each report submitted to an agency by a contractor, and each agency report which is substantially derived from or includes substantial portions of any such contractor report, shall include the following information:

(1) The name and business address of the contractor.

(2) The total amount of the contract.

(3) In any case in which a contractor uses a subcontractor to prepare any portion of the report submitted by the contractor, the name and business address of the subcontractor and the amount paid to the subcontractor for preparation of the report.

SEC. 7. EVALUATION OF CONTRACTOR PERFORMANCE.

(a) EVALUATION.—Within 90 days after the completion of the performance of a contract for advisory and assistance services, the head of the agency that awarded the contract shall prepare a written evaluation of the contractor's performance. An evaluation is not required under this subsection in the case of a contract that does not exceed $25,000.

(b) CONTENT OF EVALUATION.—An evaluation of contractor performance under subsection (a) shall include the following information:

(1) A summary description of the performance of the contractor.

(2) An assessment of the performance of the contractor based on the terms and specifications of the contract performed.

(3) Any differences between the cost of the contract and the time for completion of the contract as

provided in or estimated for such contract at the time of contract award and the actual cost of the contract and the actual time for completion of the contract, respectively, and a statement of the reasons for such differences.

(4) The purposes for which and the manner in which the services procured and any reports received under such contract are used by the agency.

(c) RECORD OF EVALUATION.—The head of an agency shall include each evaluation required by subsection (a) in the records maintained by the agency in connection with the contract to which the evaluation relates, and shall maintain copies of all such evaluations in one location.

(d) CONTRACTOR'S RIGHTS.—After preparing an evaluation of contractor performance under this section, the head of an agency shall promptly transmit to the contractor a copy of the evaluation together with a notice stating that the contractor may, within 10 days after receiving such copy, transmit comments to the agency concerning such evaluation. Any such comments shall be made a part of the evaluation as a supplement.

SEC. 8. BUDGET INFORMATION.

(a) AGENCY SUBMISSIONS.—The head of each agency shall include with the request for regular appropriations for each fiscal year submitted to the President pursuant to sec-

tion 1108 of title 31, United States Code, an itemized statement of the amounts requested by the agency for procurement of advisory and assistance services in such fiscal year. The statement shall identify such amounts according to the same subfunctional categories to be used by the President in the submission of the budget for such fiscal year pursuant to section 1105 of such title and, within each such category, shall identify such amounts according to classifications for procurement of—

(1) management and professional services;

(2) studies, analyses, and evaluations; and

(3) engineering and technical services.

(b) BUDGET SUBMISSIONS.—The budget submitted by the President to Congress for each fiscal year under section 1105 of title 31, United States Code—

(1) shall set forth separately, within each subfunctional category used in such budget, requests for new budget authority for, and estimates of outlays by, each agency for procurement of advisory and assistance services; and

(2) within each such category, shall identify such requests and estimates according to classifications for procurement of—

(A) management and professional services;

(B) studies, analyses, and evaluations; and

(C) engineering and technical services.

(c) JUSTIFICATIONS FOR REVISIONS OF BUDGET REQUESTS.—Within 60 days after the President transmits to Congress a revision of any request for new budget authority or of any estimate of outlays included in the budget for any fiscal year pursuant to subsection (b), the head of the agency affected by such revision shall prepare and transmit to Congress an analysis of such revised request or of such revised estimate, as the case may be, and a statement justifying the need for such revised request or such revised estimate.

SEC. 9. FEDERAL PROCUREMENT DATA SYSTEM.

Section 1114 of title 31, United States Code, is amended by adding at the end the following:

"(c)(1) The head of each agency shall provide the Federal Procurement Data System timely, complete, and accurate information on (A) contracts awarded by such agency primarily for the procurement of consulting services, and (B) all procurements of consulting services under contracts awarded by such agency not primarily for the procurement of consulting services.

"(2) The information provided under paragraph (1) shall include the amounts expended for the procurement of consulting services specified separately for contracts described in clause (A) of such paragraph and for procurements described in clause (B) of such paragraph.

"(3) This subsection shall not apply to a contract for consulting services, or any data, reports, or other material pertaining to such services, if the contract—

"(A) involves sensitive foreign intelligence or foreign counterintelligence activities;

"(B) involves sensitive law enforcement investigations; or

"(C) is classified under the national security classification system.

"(d) In this section:

"(1) The term 'consulting services' includes advisory and assistance services.

"(2)(A) The term 'advisory and assistance services' means services described in subparagraph (B) that an agency acquires by contract from a nongovernmental source for the support or improvement of agency policy development, decisionmaking, management, and administration, or the support or improvement of the operation of management systems.

"(B) The services referred to in subparagraph (A)—

"(i) are management and professional services, the conduct and preparation of studies, analyses, and evaluations, and engineering and technical services; and

"(ii) are furnished in the form of information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance.".

SEC. 10. ELIGIBILITY FOR AWARD OF CONSULTING CONTRACTS.

(a) CONSULTANT REGISTRATION.—(1) A consultant shall be ineligible to be awarded a contract for the procurement of advisory and assistance services by an agency unless—

(A) such consultant has registered with the office designated by the head of such agency under subsection (i) and has complied with the other requirements of this section applicable to such consultant; and

(B) such consultant has provided a copy of the consultant's registration to the contracting officer responsible for the award of such contract.

(2) The head of an agency shall prescribe with respect to each contract to be awarded by the agency the deadline for consultants to register under this section. The deadline shall be prescribed by regulation and shall be a date on or after the date on which the consultant submits a bid or proposal for the contract and before the date on which the contract is awarded.

(b) SUBMISSION OF INFORMATION ON OFFERORS' CONSULTANTS.—(1) A person who submits a bid or proposal

for a contract to be awarded by an agency shall be ineligible to be awarded such contract unless such person—

(A) submits with the bid or proposal the name and principal business address of each consultant that has furnished advice, information, direction, or assistance to such person in support of the preparation or submission of the bid or proposal; and

(B) certifies, to the best of such person's knowledge and belief, that each consultant has registered the information required in section (e).

(2) The head of an agency shall prescribe with respect to each contract to be awarded by such agency—

(A) the deadline for any person referred to in paragraph (1) to make a certification referred to in such paragraph; and

(B) the deadline for any consultant furnishing services described in such paragraph to such person to register with respect to such contract.

(3) The deadlines referred to in paragraph (2) shall be prescribed by regulation and shall be a date on or after the date on which the person submits a bid or proposal for the contract and before the date on which the contract is awarded.

(c) CONTRACTING OFFICER'S REVIEW OF REGISTERED INFORMATION.—(1) A contracting officer of an agency may

not award a contract referred to in subsection (a)(1) to a consultant unless—

(A) the contracting officer has reviewed the information contained in the registration file of the consultant and all other relevant information available to the contract officer; and

(B) has determined, in accordance with regulations prescribed by the head of an agency and on the basis of the relevant information available to the contracting officer, that the consultant does not have a conflict of interest with respect to such contract that is prejudicial to the interests of the United States.

(2) A contracting officer may not award a contract referred to in subsection (b)(1) to any person who submits a bid or proposal for such contract unless the contracting officer has reviewed the information contained in the registration file of each consultant who furnishes services described in such subsection to such person in connection with the preparation of the bid or proposal and all other relevant information available to the contracting officer to determine whether there is a conflict of interest that is prejudicial to the interests of the United States.

(d) UPDATING REGISTERED INFORMATION.—A consultant or other person shall be considered to have met the registration requirements of this section with respect to a

contract to be awarded by an agency or a bid or proposal for such a contract if such consultant or other person has previously registered in accordance with this section with respect to another contract awarded or to be awarded by such agency or a bid or proposal for such a contract and the consultant or other person timely registers (in accordance with regulations prescribed by the head of the agency) any changes in the information provided in connection with the previous registration that have occurred since the previous registration. The head of such agency shall determine whether a registration is timely for the purpose of this subsection.

(e) INFORMATION REQUIRED TO BE REGISTERED.—A person registering under this section with respect to a contract awarded or to be awarded by an agency shall include in such person's registration the following information:

(1) The name and principal business address of such person.

(2) A description of the nature of the services furnished by such person in the normal course of the business of such person and a description of the nature of the public, private, foreign, and domestic clients for which the person has furnished such services.

(3) A list of all clients (including agencies) to whom, within 3 years before the date of the registration, such person has furnished services directly related

to the services that are required by the bid or proposal under or in connection with the contract or under or in connection with a subcontract awarded or to be awarded in connection with such contract and a description of the services furnished each such client by the person.

(4) A statement of whether such person has ever been convicted of a felony and whether, at the time of the registration, there is pending any indictment or criminal information that alleges the commission of a felony by such person.

(5) A statement of whether, at the time of the registration, such person is ineligible for any reason to be awarded a contract by the Federal Government.

(6) A certification, to the best of such person's knowledge and belief at the time of the registration, that such person is not in violation of any applicable requirement set out in sections 2397, 2397a, 2397b, and 2397c of title 10, United States Code, or any contract term required by such section 2397c.

(7) A certification, to the best of such person's knowledge and belief at the time of the registration, that such person does not have a conflict of interest or potential conflict of interest described in the person's certification.

(8) The name of each officer or employee of such person who is also an officer or employee of any other person furnishing services under or in connection with—

(A) the contract; or

(B) a subcontract or prospective subcontract awarded or to be awarded in connection with such contract, and a description of the services furnished each such other person by the employee.

(f) REGISTERED INFORMATION TO BE CONSIDERED AS "COMMERCIAL INFORMATION".—Information described in subsection (e) shall be considered commercial information for the purposes of section 552(b)(4) of title 5, United States Code.

(g) ADMINISTRATIVE SANCTIONS FOR FAILURE TO SATISFY REGISTRATION REQUIREMENTS.—Each person who knowingly fails to comply with the registration requirements of this section with respect to a contract awarded to such person by an agency (except with respect to requirements waived under subsection (h)) shall be subject to such administrative action as the head of such agency may prescribe.

(h) WAIVER AUTHORITY.—(1) The head of an agency may waive the application of subsections (a) through (c) in the case of any contract awarded or to be awarded by such

agency if the head of the agency determines that such action is necessary in the interest of national security. In any case in which a waiver is made under this subsection, the information that a person is otherwise required to register under this section before award of the contract in order to be eligible for the award shall be registered with the agency within such time as the head of the agency specifies in the waiver.

(2) The head of an agency may not delegate the waiver authority under paragraph (1) to any person below the level of Assistant Secretary or the equivalent.

(i) AGENCY REPOSITORY OF REGISTERED INFORMATION.—The head of an agency shall designate a single office in the agency to be the central repository of information registered under this subsection.

(j) INAPPLICABILITY OF REGISTRATION PROVISIONS.—Subsections (a) through (c) shall not apply in the case of a contract for advisory and assistance services awarded or to be awarded by an agency if the head of such agency determines that the contract—

(1) involves—

(A) sensitive foreign intelligence or foreign counterintelligence activities;

(B) sensitive law enforcement investigations; or

(C) a special access program (within the meaning of section 119 of title 10, United States Code); and

(2) is subject to procedures prescribed by the head of such agency (other than those provided for in this section) for the identification and evaluation of any conflicts of interest that consultants may have with respect to such contract.

(k) COMPLIANCE ASSESSMENT TO BE INCLUDED IN BUDGET INFORMATION ON CONSULTING SERVICES.—The Inspector General or comparable official of each agency shall include an assessment of the compliance with the requirement of this section in each annual report required by section 1114(b) of title 31, United States Code.

(l) DEFINITIONS.—In this section, the term "consultant" means any person (including, in the case of a business organization, any affiliate of such organization) that—

(1) furnishes or offers to furnish advisory and assistance services; or

(2) pursuant to a contract, furnishes advice, information, direction, or assistance to any other person in connection with the preparation or submission of a bid or proposal for an agency contract by such other person.

SEC. 11. EXCEPTIONS.

Sections 6, 7, and 8 shall not apply to a contract for advisory and assistance services, or any data, reports, or other material pertaining to such services, if the contract—

(1) involves sensitive foreign intelligence or foreign counterintelligence activities;

(2) involves sensitive law enforcement investigations; or

(3) is classified under the national security classification system.

SEC. 12. EFFECTIVE DATE.

This Act and the amendments made by this Act shall take effect 180 days after the date of the enactment of this Act.

CONSULTANT REGISTRATION AND REFORM ACT OF 1989
BILL SUMMARY

Section 1 entitles the bill "The Consultant Registration and Reform Act of 1989."

Section 2 sets out Congressional findings regarding the government's use of consultants: the lack of compliance by the Inspectors General with current law and and the need for stricter Congressional oversight in this area.

Section 3 states that it is the policy of the United States to have Federal government policy and decisions made by accountable Federal officials; that procurment of advisory and assistance services should be carried out in compliance with applicable procurement laws and regulations; and that Federal government functions should be performed in the most economical fashion while recognizing the inherently governmental nature of certain activities.

Section 4 defines the terms used in the Act.

Section 5 institutes monitoring requirements on advisory and assistance services contracts. Before the award of a contract worth more than $25,000 which is based on an unsolicited proposal, the responsible employee must transmit a written notice of the proposed contract and the justification for the contract to the Inspector General. Whenever an advisory and assistance services contract is modified by at least $100,000, the responsible employee shall transmit to the Inspector General a written notice of the modification which shall include a description of the original contract, a description of the modification and the justification for the modification.

Section 6 requires that each report submitted to an agency by a consultant and each agency report which is substantially derived from such a report include the following information: the name and business address of the contractor; the total amount of the contract; and, in a case in which a subcontractor is used to prepare a portion of the contractor's report, the name and address of the subcontractor and the amount paid to the subcontractor.

Section 7 requires an evaluation of the contractor's performance. Within 90 days after the completion of a consultant contract worth more than $25,000, the agency must prepare a written evaluation of the consultant's performance. The evaluation shall include a summary description of the contractor's performance; an assessment of the performance; a report of the difference between the actual and estimated time and cost of completion; and a description of the purposes for which the services were procured. The contractor will be given a copy of the evaluation and will have 10 days to return any comments to the agency regarding the evaluation.

Section 8 requires that both the agency and President's budget contain itemized statements regarding the amounts requested for consultant services.

Section 9 amends Section 1114, Title 31 to require agency heads to provide information regarding advisory and assistance services costs which are embedded in larger contracts.

Section 10 creates a consultant registration requirement for consultants working for the government directly or for prime contractors who has been awarded a government contract. A consultant is required to provide the following information: name and address; a description of the services provided by the consultant; a description of the nature of the consultant's clients; a list of all clients to whom, within 3 years the consultant has provided services directly related to the contract in question; a statement as to whether the consultant has ever been convicted of a felony or whether the consultant is under indictment; a statement as to whether the consultant is currently suspended or debarred by the government; a certification that the consultant is not in violation of the revolving door statute contained in Title 10; and a certification that the consultant does not have a conflict of interest. Any consultant failing to comply with this section shall be subject to administration action as prescribed by the head of the agency.

Section 11 provides an exception for sensitive foreign intelligence or counterintelligence activities, sensitive law enforcement investigations, or contracts classified under the national security classification system for sections 6, 7, and 8.

Section 12 provides for an effective date of 180 days after the date of enactment of the bill.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-4500

OFFICE OF GENERAL COUNSEL

January 3, 1990

Honorable David H. Pryor
Chairman
Subcommittee on Federal Services, Post
Office and Civil Service
Committee on Governmental Affairs
United States Senate
Washington, DC 20510

Dear Chairman Pryor:

Enclosed are my responses to the questions you recently posed concerning my November 17, 1989 testimony on consultant registration.

Very truly yours,

Frank Keating

Frank Keating
General Counsel

Enclosures

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-4500

OFFICE OF GENERAL COUNSEL

1. HUD plans to publish the registration information in the Federal Register. How does this public notice fit in with the requirements of the Privacy Act or the Freedom of Information Act?

We believe the HUD Reform Act of 1989 on consultant registration and publication of consultant expenditure information is consistent with the Freedom of Information (FOIA) and Privacy Acts. FOIA mandates disclosure of government records unless the records are specifically exempted under one of the nine exemptions. However, withholding of information pursuant to these exemptions is discretionary, not mandatory. Therefore, the Department can choose to disclose information even if an exemption would permit the Department to withhold it. In this case we do not believe there are any FOIA exemptions which would permit HUD to withhold the registration information. The identity of individuals registering as consultants does not raise personal privacy concerns under Exemption 6. Exemption 6 permits withholding of information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. We do not view individuals conducting business with the Government as having a personal privacy interest in their identities which would outweigh the public interest justification for disclosure of that information.

The information on expenditures paid to influence Departmental decisions would also not be covered by Exemption 4 which permits the withholding of confidential business information. The contract price in awarded government contracts is not considered confidential. The disclosure of such information is considered a cost of doing business with the Government. The disclosure provisions of the HUD Reform Act of 1989 evidence a similar Congressional treatment of consultant expenditure information. The Trade Secrets Act, 18 U.S.C. §1905, prohibits the unauthorized disclosure of all data protectible by Exemption 4. However, the Trade Secret Act's disclosure prohibition is removed where there is a statute or properly promulgated regulation authorizing release. While we do not view the consultant expenditure information as protectible under Exemption 4, even if this information was so protectable the applicability of the Trade Secrets Act to that information would be negated by the HUD Reform Act which authorizes HUD to publish the expenditure information in the Federal Register.

Similarly, the Privacy Act, 5 U.S.C. 552a, does not bar publication of consultant registration information in the Federal Register. Although the Privacy Act generally prohibits disclosure of information about individuals contained in Privacy Act "systems of records," the prohibition is not applicable in cases where the information may be released under the Freedom of Information Act. See 5 U.S.C. 552a(b)(2). Since, as described above, no FOIA exemption is applicable to consultant registration information, it is our view that the information may be released under FOIA, and may be published in the Federal Register without concern about the Privacy Act.

Moreover, even if the Privacy Act were applicable to the consultant registration information, the Act permits an agency to establish, in the Federal Register, routine uses which may be made of information the agency maintains. Such routine uses permit an agency to disclose information where disclosure would be compatible with the purposes for which the information was originally collected. In this case, the information would be collected to fulfill the requirements of the HUD Reform Act of 1989, which clearly includes a provision requiring Federal Register publication. Accordingly, disclosure via Federal Register publication would be consistent with the purpose for which the information was collected.

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, D.C. 20410-4500

OFFICE OF GENERAL COUNSEL

2. Your proposal does not affect consultants working directly for HUD. Do you believe it would be useful for such consultants to provide information as to their other clients?

It is true that neither the proposed nor the enacted legislation requires consultants who work directly for HUD to provide registration information, including a listing of the consultants' other clients. However, consultants are now required to file with HUD financial disclosure statements which must include a listing of the consultant's other employers and clients. This statement would disclose potential conflicts of interests. However, since financial disclosure forms filed by most consultants are required by regulations applicable to all Executive Branch agencies (5 CFR §735.410) to be kept confidential, there would be no public scrutiny of the information contained in the forms. Of course, agency ethics officials are required to review all confidential financial disclosure forms filed by consultants employed by HUD. Where those forms indicate the existence of a conflict of interest, the agency ethics officials are required to take appropriate action to end the conflict. Such action can include termination of the consultancy arrangement. However, additional legislation would be required to bring the treatment of these HUD consultants into line with the proposed treatment of consultants covered by the registration proposals. In particular, legislation would be required to authorize HUD to publish in the Federal Register, the information submitted by HUD-employed consultants regarding their private clients.

NOT FOR RELEASE
UNTIL DELIVERY 11/17/89.

STATEMENT OF
ALLAN V. BURMAN
DEPUTY ADMINISTRATOR AND ACTING ADMINISTRATOR
OFFICE OF FEDERAL PROCUREMENT POLICY
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE
SUBCOMMITTEE ON FEDERAL SERVICES, POST OFFICE AND CIVIL SERVICE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
REGARDING CONSULTANT REGISTRATION
NOVEMBER 17, 1989

Mr. Chairman and Members of the Subcommittee ---

I am pleased to testify today regarding the Office of Federal Procurement Policy (OFPP) Policy Letter on consultants and conflicts of interest and Senate Bill 166, the Consultant Registration and Reform Act of 1989.

Our proposed Policy Letter was published on June 7, 1989, and we have received numerous comments on it from industry associations and firms, government agencies, and others. After having carefully considered the points raised by these reviewers, we have made some modifications to the proposed policy. I have attached to my statement a draft that represents our latest thinking on this issue. We plan to publish a final version shortly.

Our intent in crafting this document has been to develop procedures that will help ensure that government contracting will be free from consultant conflicts of interest, while at the same time minimizing the paperwork

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burdens imposed on those who do business with the government. We have also been concerned about preserving the confidentiality of sensitive business information.

OFPP RESPONSIBILITIES IN FY 89 DEFENSE APPROPRIATIONS ACT.

Mr. Chairman, as you know, § 8141 of the FY 89 Defense Appropriations Act, Pub. L. 100-463, required OFPP to develop government-wide policies regarding consultants and conflicts of interest. Among other things, the law required us to develop policy with respect to (1) those who provide advisory and assistance services directly to the Federal Government and (2) those who provide consulting services to prime contractors that relate to the preparation of bids and proposals in order to win federal contracts. We have chosen to refer to this latter group as "marketing consultants."

OFPP was also tasked to provide for "such registration, certification and enforcement requirements as may be appropriate, to promote compliance with such standards." Regulations under the Federal Acquisition Regulation are to issue within six months of the date of issuance of OFPP's policy.

CIRCUMSTANCES SURROUNDING ENACTMENT OF § 8141 — OPERATION ILL WIND.

As the Congress was considering the issue of consultant conflicts of interest in the summer of 1988, it was mindful of the progress of the "Ill Wind" investigation into procurement fraud. The facts of that investigation were not fully known at the time. However, our examination of the floor debates regarding this issue indicate that Members were concerned by the apparent lack of information that contracting officials had relating to

consultants' other clients, as well as the possibility of consultants' having business relationships with foreign persons.

Subsequent information from the "Ill Wind" investigation has shown individuals violated clear and unambiguous provisions of the United States Criminal Code. Therefore, the conflict of interest provisions included in the Policy Letter would probably have had little effect on the actions of those individuals. The government attorney prosecuting this case recently described the "Ill Wind" activities as "fraud and bribery, pure and simple."

MAJOR FEATURES OF THE POLICY LETTER.

In carrying out our responsibilities, we tried to find existing and already tested legislation to use as the basis for the Policy Letter. We relied heavily on certain 1977 Department of Energy legislation bearing on the same subject as § 8141, in particular, 15 U.S.C. § 789 and 42 U.S.C. § 5918. The approach taken in that legislation is in accord with our analysis of the present concerns of Congress, namely, giving more information to contracting officials on the business activities of the consultants with whom they are dealing.

Our policy has these features:

1. Definition of "conflict of interest." For purposes of the Policy Letter, we define "conflict of interest" as "that condition or circumstance wherein a person is unable or is potentially unable to render impartial

assistance or advice to the government in light of other activities or relationships with other persons, or wherein a person is given an unfair competitive advantage."

2. Certification. Various certifications are to be provided by consultants dealing directly with the government and by prime contractors competing for government contracts who employ consultants to help them prepare bids and proposals. Certification will be on a contract-by-contract basis, with certain exemptions. Only the apparently successful offeror will have to certify.

3. Reliance on judgment and experience of government officials. A key concept of the policy is to rely upon the judgment of government contracting officials to detect and take action upon conflicts of interest. This is in place of relying on elaborate and expensive centralized data filing alternatives. The contracting officer will, of course, have the option of making further inquiry if he or she judges that additional information beyond that provided is necessary. We have also retained the concept that responsibility for identifying and preventing conflicts of interest is shared among the government contracting officer, the requester of the service, and other government officials. Responsibility for deciding whether to award a particular contract, however, is that of the contracting officer alone.

4. Mandatory preaward review. The Policy Letter requires a mandatory preaward review as a means of sensitizing government contracting personnel

to conflict of interest and ethical issues in the same way that preparation and submission of the required certificates force contractors to address these issues.

5. Flexibility. The determination of the presence of a possible conflict of interest permits the exercise of discretion without necessarily requiring a withholding of contract award. Contracting officers are given sufficient flexibility to find ways of drafting contract language to avoid or mitigate conflicts.

6. Education and sensitization. We believe that the Policy Letter will also serve an important function by educating and sensitizing all members of the contracting community to conflict of interest issues. Requiring certifications is intended to make contractors reflect on their ethical responsibilities in one important area of government contracting and adjust their behavior appropriately. Similarly, contracting officers will pay increased attention to the issue of conflict of interest as a result of being required to make an explicit pre-award conflict of interest determination with respect to every covered contract.

7. Other enforcement measures. Where mere personal awareness and reflection on applicable ethical requirements are not sufficient, the possibility of criminal sanctions for making false statements in any certification will further encourage compliance with ethical requirements. The requirement to disclose information to the government through the certification will also cause consultants to be more likely to report, or,

where possible, avoid any potential conflicts of interest.

8. Thresholds. As a result of the huge numbers of contract actions that take place in the Federal Government each year, we have sought to limit the burden on the contracting community -- both government and industry -- by focusing only on contracts for relatively large dollar amounts. For direct contract awards for advisory and assistance services, the level requiring certification is $25,000, while for prime contractors employing marketing consultants the level is $200,000.

9. Remedies. If an offeror fails to submit a certificate, or a particular conflict of interest cannot be avoided or mitigated and the interests of the United States do not otherwise require award, the Policy Letter authorizes contracting officials to make a finding that a particular offeror is nonresponsible. Suspension or debarment procedures may be used for any misrepresentation of fact. Criminal prosecutions can, of course, be instituted for fraudulent statements.

10. Registration. While contractors are, in effect, "registering" with the government through the certification process, we have chosen not to require a central filing or collation of information collected pursuant to the Policy Letter. However, we have not foreclosed this option if agencies conclude that such efforts would be useful. The Policy Letter explicitly permits agencies to accumulate the data obtained in any way they see fit.

We consulted with government officials having responsibilities to maintain large centralized registration systems of lobbyists, securities dealers, or foreign agents. Creation and maintenance of such systems are expensive, and we believe that -- as a preliminary matter -- the approach specified in our Policy Letter is preferable. A related concern about any central registration is the ability of the government to protect sensitive business information.

CHANGES IN THE POLICY LETTER AS A RESULT OF PUBLIC COMMENTS.

The major changes we have made in the Policy Letter are as follows:

1. **Definition of unfair competitive advantage.** Several people requested that the term "unfair competitive advantage" in the Policy Letter be defined. The underlying general concept of the definition is that people should not benefit from exclusive access to information. We intend this to be consistent with and to supplement the provisions of FAR Subpart 9.5, Organizational Conflicts of Interest as well as the new Procurement Integrity rules.

2. **Providing for contractor standards of conduct.** Several respondents questioned provisions relating to internal standards of conduct and codes of ethics. We have reconsidered this portion of the Policy Letter and, based on the comments received, have deleted these provisions.

3. **Clarification of definitions.** We have made clear that our definition of advisory and assistance services does not exclude all kinds of

engineering and technical services. We have attempted to clarify the difference between "routine" technical or engineering services and services that have a major discretionary component. These distinctions cannot be precise and further efforts will likely be required in this area by those writing implementing regulations.

4. Reexamine reliance on Circular A-120. One respondent suggested that in considering how to define advisory and assistance services, we should look at the conceptual problems with Office of Management and Budget Circular A-120, Guidelines for the Use of Advisory and Assistance Services. As you know, Mr. Chairman, this is a continuing problem, and we are proceeding with our planned revision of the Circular. For the time being, the Policy Letter will rely on the Circular for the definition of advisory and assistance services. This is to avoid a proliferation of definitions of that term.

5. Same or substantially similar. Some respondents expressed concern over the requirement that information would need to be reported about clients when the consultant has rendered "services respecting the same subject matter of the instant solicitation, or substantially similar to it . . . ." We agreed that this was a very broad formulation and have devised a version that emphasizes the need for more of a connection to the instant solicitation. This is another area where we look to the regulation writers to help in providing guidelines to consultants and other would be contractors.

6. **Agency head waivers.** Some respondents requested a different provision for agency head waivers, namely that we provide for a waiver if the services in question are "integral to the operation of a program or system." We did not adopt this approach because we think the concept of integral services is ambiguous. Based on other comments, we have clarified that the waiver authority is to be exercised on a contract-by-contract basis, and only by the head of the agency.

7. **Thresholds, time periods.** We did not adopt the suggestion to lower and make uniform all thresholds provided for in the Policy Letter. Nor did we adopt a suggestion that we raise the thresholds. We have tried to establish thresholds that will allow the government to collect meaningful data yet not burden large numbers of contractors where the risk of abuse is low. As practice dictates, we can revise the thresholds in the future.

8. **Apparently successful offeror.** One respondent suggested that we require certificates of others beside the apparently successful offeror. This would have the advantage of ensuring that contractors address conflict of interest questions at the earliest opportunity and that procurements are not needlessly delayed. We have provided new language in paragraph 8(c) of the Policy Letter to encourage prime contractors to make timely inquiries of their marketing consultants. We believe this approach will meet the government's need while minimizing the burden on contractors.

In summary, the comments we have received have been helpful and we believe

that the Policy Letter offers a balanced and reasonable approach for addressing consultant conflict of interest concerns without overburdening the acquisition process.

COMMENTS ON SENATE BILL 166.

The Committee has also asked that I comment on the provisions of Senate Bill 166, the "Consultant Registration and Reform Act of 1989." My comments on this proposed legislation are as follows:

1. Scope of monitoring of procurements of advisory and assistance services. Section 5 of S. 166 requires that contracts for advisory and assistance services for $25,000 or more be reported to the agency inspector general or comparable official. While the dollar threshold is the same as the one we have employed, S. 166 deals only with contracts based on unsolicited proposals. We require certification regardless of whether a proposal was or was not solicited.

S. 166's requirements respecting modifications affects all contracts for advisory and assistance services, but only for modifications of $100,000 or more.

In addition to obtaining certifications on advisory and assistance services provided directly to the government, we focus on relations with "marketing consultants," namely, those who provide services in support of the preparation of bids or proposals.

2. Identification of reports. Section 6 of S. 166 requires contractors and agencies to supply certain information about who prepared or participated in the preparation of reports and the cost of the efforts. Under our Policy Letter, consultants must provide information about their present or recent work so that government contracting officials can determine the likely presence of a conflict of interest. Both approaches appear likely to ensure that the person to whom a report is submitted can make an independent assessment of potential conflicts of interest associated with any recommendation or conclusion.

3. Evaluation of contractor performance. Section 7 of S. 166 requires that the performance of consultants on any contract be evaluated in a timely fashion. While our Policy Letter has no comparable provision, OMB Circular No. A-120 currently requires such an evaluation.

4. Budget information. Section 8 of S. 166 requires itemized statements detailing the amounts requested for advisory and assistance services be submitted with each request for regular appropriations and with the budget submitted by the President. Justifications are required to be submitted whenever there is a revision of budget requests. Title 31 U.S.C. § 1114 requires submission of similar information, though it is less detailed. Our Policy Letter, on the other hand, does not require any overall reporting of such information. We are preparing a test in connection with the Federal Procurement Data System (FPDS) that we hope will enable that system to provide better data to both the Executive Branch and to Congress.

5. Federal Procurement Data System. Section 9 of S. 166 would amend 31 U.S.C. § 1114 by requiring agencies to provide detailed advisory and assistance services source funding information to the FPDS. The present approach in the FPDS is not to report expenditures for advisory and assistance services when those services comprise less than 50% of the total value of the procurement. We believe a more precise accounting of such services is needed.

6. Eligibility for award of consulting contracts. Section 10 of S. 166 calls for a system of centralized registration of consultants. Unless consultants register and provide a copy of their registration to contracting officials in connection with particular procurements, they will be ineligible for award of a contract. Similarly, offerors who employ consultants to assist them in the preparation of their bids or proposals must identify those consultants to the agency, and those consultants themselves must register with the agencies. A copy of the registration is to be submitted with each bid or proposal.

Unless certain exemptions for law enforcement and national security apply, § 10(e) of S. 166 requires:

1. a description of the normal services furnished by the consultant;
2. a list of clients to whom services were provided in the last three years that are directly related to the services required by the bid or proposal;
3. information about felony convictions or charges;
4. information about eligibility to receive an award of a contract;

5. a certification that the person is not in violation of various ethics and conflict of interest provisions of the U.S. Code;

6. a conflict of interest certification; and

7. information about employees of a consultant also working for other firms that are providing services in connection with a particular contract.

Our Policy Letter requires that consultants report information on possible conflicts within the previous year rather than the previous three. However, we have provided for authority to require three years worth of data if senior officials require it. We believe this represents a balanced approach.

We have not required information about criminal convictions. Our focus has been exclusively on ensuring that the advice that taxpayer money buys is as impartial as possible.

The certification respecting violations of various sections of the U.S. Code has a similar purpose as requiring a certification about conflicts of interest. The person required to supply them cannot fail to be made more aware of the requirements of the law, or other relevant authority. However, for the certifications in our Policy Letter, we have relied heavily on the Department of Energy legislation, as I mentioned previously.

We have not opted for a central registration of consultants within each agency. Our reliance has been placed on a contract-by-contract examination of activities and relationships within what we hope is a reasonable period of time. We rely heavily on the good judgment and experience of our

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contracting officials and rely to a lesser degree on any device entailing centralized recordkeeping. However, we specifically provide in § 10(a) of our Policy Letter that agencies may do what S. 166 requires if they deem this appropriate.

CONCLUSION.

I appreciate the opportunity to describe our proposed Policy Letter. I believe our proposal carries out the provisions of § 8141 of the FY 89 Defense Appropriations Act. I also believe that the approach of our Policy Letter and Senate bill 166 are not dissimilar. Mr. Chairman, you have been an important force in identifying problems and stimulating a reexamination of the role played by consultants in the day-to-day operations of the Federal Government. A large amount of money is spent to procure their services and they indeed provide very valuable, unique, and necessary services. We certainly want to be confident that the advice the government receives is as objective as possible, and not prompted by motivations of gain. We also have an obligation to see that laws and regulations affecting the acquisition process are necessary and impose the least burden on the government and industry contracting community. We believe that the Policy Letter meets these tests. We also need to recognize, however, that, as you have pointed out in your report on the Department of Energy's conflict of interest procedures, such policies and regulations can only achieve this purpose if they are effectively carried out.

Mr. Chairman, this concludes my prepared remarks, I will be happy to answer any questions.

OFFICE OF MANAGEMENT AND BUDGET **DRAFT**

Office of Federal Procurement Policy

Policy Letter on Consultants and Conflicts of Interest; Invitation for Public Comment

AGENCY: Office of Management and Budget, Office of Federal Procurement Policy.

ACTION: The Office of Federal Procurement Policy (OFPP) is publishing a Policy Letter dealing with consultants and conflicts of interest.

SUMMARY: This OFPP Policy Letter establishes (a) government-wide policy relating to conflict of interest standards for persons who provide consulting services to the United States Government or to persons who contract with the United States, and (b) procedures to promote compliance with those standards.

The policy is issued pursuant to section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. No. 100-463, 102 Stat. 2270-47 (1988) and section 6 of the OFPP Act, codified at 41 U.S.C. section 404.

Section 8141 directs that government-wide regulations be promulgated to implement the provisions of this Policy Letter no later than 180 days after the date of issuance of the policy.

Before the issuance of the regulations required by section 8141, the President is empowered to make a determination that the regulations "would have a significantly adverse effect on the accomplishment of the mission of the Department of Defense or other federal government agencies . . . ." Submission of a report containing an adverse effect determination to Congress will automatically nullify and void the regulations.

Section 8141 also directs the Comptroller General to report to Congress no later than one year from the date of enactment his assessment of the effectiveness of the regulations prescribed pursuant to the section.

SUPPLEMENTARY INFORMATION: A proposed Policy Letter was published on June 7, 1989, at 54 Fed. Reg. 24435. Twenty-six comments were received by OFPP in response to its request for comments. The following summarizes the major issues raised and explains how OFPP responded.

1. **Definition of unfair competitive advantage.** Several people requested that the term "unfair competitive advantage" be defined and a definition has been provided. The underlying general concept of the definition is that people should not benefit from exclusive access to information. This is intended to be consistent with and to supplement the provisions of FAR Subpart 9.5, Organizational Conflicts of Interest as well

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as the new Procurement Integrity rules. However, corporate knowledge and experience gained from performance of previous contracts with the Federal Government do not create an unfair competitive advantage on the part of the person or entity possessing that knowledge or experience. These are, in fact, factors that may cause contracting officials to evaluate an offeror more favorably than a competitor.

Similarly, having served as an incumbent on the contract in question prior to the solicitation in question is not considered to confer an unfair competitive advantage upon that incumbent with respect to any subsequent award of the contract. Also, participation of a contractor in an earlier phase of an acquisition, e.g., an earlier research and development phase, is deemed not to confer an unfair competitive advantage with respect to any subsequent phase of the contract.

2. Definition of "conflict of interest." One respondent observed that nowhere does the definition of "conflict of interest" make clear that the consultant must be "acting in conflict with a prior and continuing obligation to another party," and that the examples given in section 4(d) of the Policy Letter encompass perfectly permissible activity. We believe, however, that it is sufficient to require "impartial" assistance or advice. The examples given, furthermore, are cited as situations in which there is a potential for conflicts to arise.

Another respondent pointed out that we have provided no standards by which a contractor can reasonably determine whether a possible conflict exists. We have added explanatory language to the definition, but also envision that the writers of the regulations that will implement this Policy Letter will provide further clarification where necessary to permit contractors to make more meaningful "bid/no bid" decisions and to permit contracting officers to make more informed judgments about whether a conflict of interest may be present.

Several respondents pointed out the redundancies in the proposed definition of conflict of interest. Accordingly, we substituted "impartial" for "impartial, technically sound, or objective."

Another suggestion was to make the definition of "conflict of interest" in the Policy Letter consistent with the FAR 9.501 definition. We believe the two definitions are consistent. However, for the Policy Letter, we have relied principally on the definition of conflict of interest provided in 1977 legislation pertaining to the Department of Energy at 15 U.S.C. section 789 and 42 U.S.C. section 5918. Furthermore, FAR Subpart 9.5 emphasizes restrictions on future activities, whereas sections 10(e) and 12 of this Policy Letter explicitly authorize contracting officers not to award a contract at all, as opposed to writing restrictions applicable to future activities into a contract to be awarded. (FAR 9.501 provides as follows: An "organizational conflict of interest exists when the nature of the work to be performed under a proposed Government contract may, without some restriction on future activities, (a) result in an unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work.")

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3. **Providing for contractor standards of conduct.** Several respondents questioned provisions relating to internal standards of conduct and codes of ethics. Another objected to the lack of full disclosure afforded firms with such standards. We have reconsidered this portion of the Policy Letter and, based on the comments received, have deleted these provisions.

4. **Consistency with procurement integrity law.** Several respondents requested that the Policy Letter be harmonized with the recently enacted procurement integrity provision in section 27 of the OFPP Act, codified at 41 U.S.C. section 423. The Policy Letter seeks to prevent the use of privileged information, consistent with section 423, but only with respect to consultants, rather than all competing contractors or procurement officials, as these terms are defined in section 423.

5. **Consistency with Department of Energy conflict of interest regulatory program.** The Department of Energy urged OFPP to recognize an exception from the application of the Policy Letter where an agency's conflict of interest program goes beyond the intent and coverage of the proposed Policy Letter or is based on other statute or authority requiring conflict of interest provisions. In formulating our policy we relied heavily on the same statutory authority that is the basis of the Department of Energy's conflict of interest program, so there should not be a conflict between the approach chosen by the Department and this policy. Where the Department is subject to a specific statutory mandate, it must, of course, comply.

6. **Certificate unnecessary.** One respondent objected to calling for the use of a certification. We believe, however, that certification offers a reasonable means for ensuring heightened attention to conflict of interests by both government and industry personnel, in keeping with the intent of the statute.

7. **Clarification of definitions.** Comments received highlight the difference between nondiscretionary technical or engineering services and services that assist in formulation of policy and decisionmaking. One respondent correctly pointed out that our definition of advisory and assistance services appeared to exclude engineering and technical services, when in fact those kinds of services do involve discretionary decisions. Accordingly, we make clear that not all engineering and technical services are included, only those involving this discretionary element.

Thus, a "tech rep" who is engaged to maintain a diesel generator will indeed be rendering a technical service, but he will maintain the equipment according to well established technical standards likely found in a maintenance manual.

These situations are to be contrasted with an engineer's recommending that an XYZ Corporation antitank missile be purchased rather than one produced by the ABC Corporation when he or she has done work for XYZ on antitank missiles in the past.

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Similarly, if an accounting firm is hired to install an accounting system already identified in a solicitation, this is distinguishable from its being hired to recommend which system the government should install. A consultant that tests auto emissions for an auto manufacturer provides a different type of service when it advises the Environmental Protection Agency on emission standards for autos.

In all the exclusions provided for there is the underlying belief that they either do not involve the making of highly discretionary decisions or that the potential for abuse, even if present, is not serious. Also we note the fact that many professionals are governed by strict codes of ethics, as well as the fact that even within a single firm it is possible for informal peer review to play a part in ensuring adherence to established technical principles and procedures. Nonetheless, a sensitivity to conflict of interest issues should guide government and private officers and employees at all times, even when this Policy Letter or other laws or regulations do not impose specific duties. Provisions for exclusions in this Policy Letter are not intended to encourage ways of doing business that are not in accordance with the highest ethical standards. See subsection 6(b) of the Policy Letter.

8. **Reexamine reliance on Circular A-120.** One respondent suggested that in considering how to define advisory and assistance services, we should look at the conceptual problems with Office of Management and Budget Circular A-120, Guidelines for the Use of Advisory and Assistance Services. The respondent contends that the assumptions underlying Circular A-120 are outdated to the extent that the Competition in Contracting Act has injected more competition into the process of acquiring advisory and assistance services.

There is merit to this view and it will be taken into account in considering the recommendations of an inter-agency working group that is studying ways to improve Circular A-120. For the present, the Policy Letter has sought to avoid a proliferation of definitions of "advisory and assistance services" by incorporating by reference the definitions in Circular A-120.

9. **Same or substantially similar.** Respondents expressed concern over the requirement that information would need to be reported about clients when the consultant has rendered "services respecting the same subject matter of the instant solicitation, or substantially similar to it . . . ." They believe this will adversely affect consultants who render specialized services relating to a narrow range of activities, as, for example, generic inventory control systems. We have clarified the requirement by changing the language of paragraphs 8(b)(5) and 9(b)(4) of the Policy Letter to require information with respect to "the same subject matter of the instant solicitation, or directly relating to such subject matter . . . ." This approach emphasizes the need for more of a connection to the instant solicitation than that inherent in the idea of substantial similarity, and focuses attention on conduct that has the greatest potential for conflicts of interest.

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10. **Agency head waivers.** Some respondents requested a different provision for agency head waivers, namely that we provide for a waiver if the services in question are "integral to the operation of a program or system." We did not adopt this approach because we think the concept of integral services is ambiguous. Based on other comments, we have clarified that the waiver authority is to be exercised on a contract-by-contract basis, and only by the head of the agency.

11. **Thresholds, time periods.** We did not adopt the suggestion to lower and make uniform all thresholds provided for in the Policy Letter. Nor did we adopt a suggestion that we raise the thresholds. We have tried to establish thresholds that will allow the government to collect meaningful data yet not burden large numbers of contractors where the risk of abuse is low. As practice dictates, we can revise the thresholds in the future. A related suggestion was made to make the certification provisions apply only to procurements of major systems. We believe this to be too restrictive a provision. We also did not adopt a suggestion that marketing consultants be required to report on their activities for a period longer than 12 months.

12. **Apparently successful offeror.** One respondent suggested that we require certificates of others beside the apparently successful offeror. This would have the advantage of ensuring that contractors address conflict of interest questions at the earliest opportunity and of ensuring that a successful offeror discovered to have a conflict of interest on the verge of being awarded a contract does not delay the procurement unduly if it happens that an award cannot be made to that contractor. Because of the importance of the conflict of interest issue, we believe that contractors already have the incentive to address the issue as early as possible. We have also provided new language in paragraphs 8(c) of the Policy Letter to encourage this. We agree that there is a risk of delay in our approach but we believe the flexibility available in the device of modifying contract language to avoid or mitigate conflicts will reduce that risk. Finally, our approach minimizes the burden on contractors.

13. **Reliance on contractor judgments.** One respondent questioned our reliance on a form of self-certification in paragraphs 8(c) and 9(b)(5) of the Policy Letter because of the subjectivity involved in such a device. We recognize the validity of this observation but choose not to devise an alternative approach that causes large amounts of raw information to flow to the hands of the contracting officer. We believe the approach selected adequately heightens sensitivity to conflict of interest problems.

14. **Three-year option.** One respondent suggested that the provision in section 10(f) of the Policy Letter permitting the contracting officer to request up to three years of data is a significant requirement. We agree, but note that these data can only be requested upon approval of the head of the contracting activity. We anticipate that this authority will be sparingly used, and then only for limited periods of time.

15. Prime contractor retention of marketing consultant certificates.

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One respondent suggested that we provide for the prime contractor to retain the marketing consultant's certificate in its files, similar to the procedure established in section 27a of the OFPP Act, codified at 41 U.S.C. section 423, relating to procurement integrity. We did not adopt this suggestion because we want the marketing consultant's certificate to be addressed to the government and to be retained by the government in the event of a false statement. Also, we want all certificates that contain information relating to any unfair competitive advantage to be delivered to the contracting officer.

16. **Paperwork Reduction Act.** One respondent suggested that the Policy Letter requires submission of information and is hence an information collection request requiring clearance from the Office of Management and Budget's Office of Information and Regulatory Affairs. While the Policy Letter itself requires no submission of data, the regulations implementing the letter will require Paperwork Reduction Act clearance.

17. **Prime contractor's role in processing marketing consultant information.** One respondent suggested that the information to be submitted by a marketing consultant be sent to the contracting officer, not the prime contractor. We did not adopt this suggestion because we want the prime contractor to be a participant in the process of watching for unfair competitive advantages on the part of people or firms it might wish to engage. This will require marketing consultants to provide information bearing on any possible unfair competitive advantage they might provide. We anticipate that this requirement will have the effect over time of causing marketing consultants to avoid activities that may lead to unfair competitive advantages. The idea that prime contractors might be tasked to collect information from marketing consultants in sealed envelopes would solve the confidentiality problem but this would effectively remove the prime from the process, the opposite of the result we are trying to achieve.

18. **Large consulting organizations.** Several respondents pointed out their concerns about how the policies in the Policy Letter will affect large consulting offices that employ many people in many branches around the world, particularly when the branches operate independently of centralized management. They also pointed out that their accounting systems have not been designed to track conflict of interest data. We have tried to define the kind of information we wish contractors to provide so that firms, even large firms, will be able to make reasonable inquiries. Nonetheless, the regulation writers may if they choose, provide for flexibility on the part of such firms, such as limiting the duty to inquire within certain geographical areas, subsidiaries, or work groups, among other things.

DATE: This Policy Letter is effective 30 days from the date of issuance on the first page of the Policy Letter. Because of the necessity for implementing regulations, the Policy Letter is issued in final form now, but will apply only to solicitations issued after the effective date of the regulations. Comments on the Policy Letter must be received within 30 days from the date of publication.

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ADDRESS: Comments should be submitted to the Office of Management and Budget, Office of Federal Procurement Policy, Room 9025, New Executive Office Building, 725 17th Street, NW, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Richard A. Ong, Deputy Associate Administrator, Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202)395-6810.

Allan V. Burman
Acting Administrator and
Deputy Administrator

Dated: November __, 1989

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

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Policy Letter 89-1 November __, 1989

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Conflict of Interest Policies Applicable to Consultants

1. Purpose. The purpose of this Policy Letter is (a) to establish policy relating to conflict of interest standards for persons who provide consulting services to the government and to its contractors and (b) to provide procedures to promote compliance with those standards.

2. Authority. This Policy Letter is issued pursuant to section 8141 of the 1989 Department of Defense Appropriation Act, Pub. L. 100-463, 102 Stat. 2270-47 (1988) (hereinafter referred to as "the Act") and section 6 of the Office of Federal Procurement Policy (OFPP) Act, codified at 41 U.S.C. section 404.

3. Background. This Policy Letter is intended to implement section 8141 of the Act. That section provides, in part, as follows:

> "(a) Not later than 90 days after the date of enactment of this Act, the Administrator of the Office of Federal Procurement Policy shall issue a policy, and not later than 180 days thereafter government-wide regulations shall be issued under the Office of Federal Procurement Policy Act which set forth:
>
> > "(1) conflict of interest standards for persons who provide consulting services described in subsection (b); and
> >
> > "(2) procedures, including such registration, certification, and enforcement requirements as may be appropriate, to promote compliance with such standards.
>
> "(b) The regulations required by subsection (a) shall apply to the following types of consulting services:
>
> > "(1) advisory and assistance services provided to the government to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United

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States;

"(2) services related to support of the preparation or submission of bids and proposals for federal contracts to the extent that inclusion of such services in such regulations is necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States; and

"(3) such other services related to federal contracts as may be specified in the regulations prescribed under subsection (a) to the extent necessary to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States."

4. Definitions.

(a) "Advisory and assistance services" means advisory and assistance services as defined in OMB Circular No. A-120, "Guidelines for the Use of Advisory and Assistance Services," dated January 4, 1988, and any amendments thereto. Only those compensated services provided pursuant to nonpersonal service contract are covered by this Policy Letter.

(1) Such services include --

(i) services provided by individual experts and consultants;

(ii) management and professional support services;

(iii) the conduct and preparation of studies, analyses, and evaluations; and

(iv) engineering and technical services.

(2) Exclusions. In addition to the exclusions in OMB Circular A-120, the following services are excluded from the coverage of this Policy Letter:

(i) routine engineering and technical services (such as installation, operation, or maintenance of systems, equipment, software, components, or facilities);

(ii) routine legal, actuarial, auditing, and accounting services; and

(iii) training services.

(b) "Agency" means an executive department specified in section 101 of title 5, United States Code; a military department specified in section 102 of such title; an independent establishment as defined in section 104(1) of such title; and a wholly owned government corporation fully subject to the

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provisions of chapter 91 of title 31, United States Code.

(c) "Conflict of interest" means that condition or circumstance wherein a person is unable or is potentially unable to render impartial assistance or advice to the government because of other activities or relationships with other persons, or wherein a person is given an unfair competitive advantage.

The critical element in this definition is the existence of a relationship or potential relationship that might cause an offeror, if awarded a contract, to make recommendations or interpretations that, at the expense of the government, favor the interests of the offeror directly, or those of persons or entities presently or potentially able to confer a benefit on the offeror.

Types of potential conflicts include, but are not limited to, the following:

(1) evaluating a contractor's, or potential contractor's products or services, where the evaluator is or was substantially involved in the development or marketing of those products or services;

(2) serving as a consultant to a contractor seeking the award of a contract (or seeking to be awarded the contract directly) after preparing or assisting substantially in the preparation of specifications, or other significant contract provisions or requirements, to be used in the same acquisition;

(3) serving as a consultant to a contractor seeking the award of a contract (or seeking to be awarded the contract directly) after having access to source selection or proprietary information not available to other persons competing for the contract; and

(4) providing advice and assistance to an agency where such advice and assistance could benefit the contractor's other clients.

(d) An "unfair competitive advantage" exists where, in addition to the situations addressed in FAR Subpart 9.5, a person competing for award of a contract

(1) possesses proprietary information (defined at FAR 3.104-4(j)) of a competitor or potential competitor relevant to the instant contract, or

(2) possesses source selection information (defined at FAR 3.104-4(k)) relevant to the instant contract but not available to all contractors,

in violation of section 27 of the OFPP Act, codified at 41 U.S.C. section 423.

(e) "Marketing Consultant" means any independent contractor who furnishes

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advice, information, direction, or assistance to any other contractor in support of the preparation or submission of a bid or proposal for a government contract by such contractor. An independent contractor is not a marketing consultant if he or she would be rendering advisory and assistance services pursuant to any of the exclusions in paragraph 4(a)(2), above.

5. Exemptions. The following may be exempted from the application of policies and regulations issued under this Policy Letter:

(a) Intelligence activities. Services rendered in connection with intelligence activities as defined in section 3.4(e) of Executive Order 12333 or a comparable definitional section in any successor order, or in connection with special access programs; and

(b) Public interest considerations. Specific contract actions where the head of an agency grants a waiver on the basis of the public interest.

6. Policy. Agencies must comply with the following policies:

(a) Responsibility for identifying and preventing potential conflicts of interest in government contracts is shared among the government contracting officer, the requester of the service, and other government officials with access to applicable information. The responsibility for deciding whether to award a particular contract, however, rests with the government contracting officer;

(b) Prior to contract award, contracting officers shall take appropriate steps to identify and evaluate the potential for conflicts of interest that could be prejudicial to the interests of the United States with regard to persons who provide advisory and assistance services to the government, and to take steps to avoid or mitigate any conflicts believed to exist; similar actions will be taken with regard to any unfair competitive advantage that marketing consultants provide to contractors;

(c) Federal contracting officers shall require, for contracts covered by this Policy Letter, that the apparent successful offeror provide certified information describing the nature and extent of any conflicts of interest that may exist with respect to the proposed award. Marketing consultants shall also be required to certify that they have provided no information to the contractor employing them that would give the contractor an unfair competitive advantage;

(d) Federal procurement officials shall encourage contractors to consider carefully the potential for conflicts of interest in all of their activities associated with federal procurement, and shall be sensitive to the appearance of conflicts of interest in any contracting actions; and

(e) Federal procurement regulations that implement this policy and address conflicts of interest shall take into account the need to (1) encourage participation of highly qualified persons and firms in federal procurement programs; (2) enhance and safeguard the Nation's industrial base; (3)

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promote full and open competition in the award of government contracts; and (4) improve the overall effectiveness and efficiency of the government's procurement programs.

7. Responsibilities of the Defense Acquisition Regulatory Council and Civilian Agency Acquisition Council. The Councils shall promulgate the government-wide regulations specified in section 8141 of the Act within 180 days of the effective date of this Policy Letter. Such regulations shall conform to the policies established herein. Only solicitations issued after the effective date of the regulations are affected by these policies.

8. Responsibilities of prime contractors employing marketing consultants. An individual or firm that employs, retains, or engages one or more marketing consultants in connection with a federal acquisition must submit to the contracting officer, with respect to each marketing consultant, the certificates described below, if the individual or firm is notified that it is the apparent successful offeror.

(a) Certificate required. No certificates are required for contracts of $200,000 or less. For contracts over $200,000, the contractor must file the certificate described below with respect to each marketing consultant, or provide a written statement to the contracting officer giving the reasons why no such certification can be made. The reasons given must be satisfactory to the contracting officer as to why such certificate cannot be made.

(b) Contents of certificate. The certificate to be submitted must contain the following:

(1) the name of the agency and the number of the solicitation in question,

(2) the name, address, telephone number, and federal taxpayer identification number of the marketing consultant;

(3) the name, address, and telephone number of a responsible officer or employee of the marketing consultant who has personal knowledge of the marketing consultant's involvement in the contract;

(4) a description of the nature of the services rendered by or to be rendered by each marketing consultant;

(5) based on information provided to the contractor by the marketing consultant, if any marketing consultant is rendering or, in the 12 months preceding the date of the certificate, has rendered services respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, to the government or any other client (including any foreign government or person), the name, address, and telephone number of the client or clients, and the name of a responsible officer or employee of the marketing consultant who is knowledgeable about the services provided to such client(s), and a description of the nature of the services rendered to such client(s);

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(6) a statement that the person who signs the certificate for the prime contractor has informed the marketing consultant of the existence of this Policy Letter and associated regulations; and

(7) the signature, name, title, employer's name, address, and telephone number of the persons who signed the certificates for both the prime contractor and the marketing consultant.

(c) Marketing consultant certificate. In addition, the prime contractor will forward to the contracting officer a certificate addressed to the government and signed by the marketing consultant that (i) such marketing consultant has been told of the existence of the regulations implementing this Policy Letter and (ii) such marketing consultant has made inquiry, and to the best of his or her knowledge and belief, he or she has provided no unfair competitive advantage to the prime contractor with respect to the services rendered or to be rendered in connection with the solicitation, or that any unfair competitive advantage that, to the best of his or her knowledge and belief, does or may exist, has been communicated to the prime contractor. Prime contractors may request such a certificate from a marketing consultant, or make inquiries of any marketing consultant, at any time they negotiate for the marketing consultant's services, or afterwards, until an award is made, to satisfy themselves that the marketing consultant has no unfair competitive advantage.

9. Responsibilities of contractors providing advisory and assistance services. Those individuals or firms providing advisory and assistance services to the government must submit to the contracting officer the certificate or certificates described below if the individual or firm is notified that it is the apparent successful offeror.

(a) Certificate required. No certificates are required for contracts of $25,000 or less. For contracts over $25,000, the certificate described in (b), below, must be filed or a written statement provided to the contracting officer giving the reasons that no such certification can be made. The reasons given must be satisfactory to the contracting officer as to why such certificate cannot be made.

(b) Contents of the certificate. The certificate must contain the following:

(1) name of the agency and the number of the solicitation in question;

(2) the name, address, telephone number, and federal taxpayer identification number of the apparent successful offeror,

(3) a description of the nature of the services rendered by or to be rendered on the instant contract;

(4) if, in the 12 months preceding the date of the certification, services were rendered to the government or any other client (includ-

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ing a foreign government or person) respecting the same subject matter of the instant solicitation, or directly relating to such subject matter, the name, address, telephone number of the client or client(s), a description of the services rendered to the previous client(s), and the name of a responsible officer or employee of the offeror who is knowledgeable about the services rendered to each client. The agency and contract number under which the services were rendered must also be included, if applicable;

(5) a statement that the person who signs the certificate has made inquiry and that, to the best of his or her knowledge and belief, (a) no actual or potential conflict of interest or unfair competitive advantage exists with respect to the advisory and assistance services to be provided in connection with the instant contract, or (b) that any actual or potential conflict of interest or unfair competitive advantage that does or may exist with respect to the contract in question has been communicated in writing to the contracting officer or his or her representative; and

(6) the signature, name, employer's name, address, and telephone number of the person who signed the certificate.

10. Responsibilities of Executive Branch Agencies.

(a) Maintenance of data files. Each agency must maintain the certificates described by this Policy Letter in the contract file. Agencies may extract and categorize such information from these files and consolidate them in a central registry, as appropriate, subject only to the requirement to safeguard information (1) as requested by the submitter of the certificate as confidential, sensitive, privileged, proprietary, or otherwise not releasable, or (2) based on independent agency determinations not to release the information pursuant to the Freedom of Information Act, or other authority.

(b) Availability of data. Certificates must be made available to department or agency contracting officers and their superiors, advisors, or their designees, as well as to inspectors general and government audit officials.

(c) Nondisclosure of information. Agencies and departments must protect, to the fullest extent permitted by law, all sensitive business and other information submitted pursuant to any policy devised or regulation promulgated pursuant to the Act. Contractors and consultants must take care to identify what information is not releasable. Opportunity to so mark such information shall be afforded to the submitter of the information at any time.

(d) Preaward conflict of interest analysis; special contract provisions. Agency officials must, before an award of a contract is made, determine whether a conflict of interest exists with regard to those providing advisory and assistance services to the government, or whether an unfair competitive advantage exists with respect to services provided by a marketing consultant in connection with a particular contract action. In performing this function, they may use (a) information from any certifi-

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cates or statements previously submitted or submitted with the bid or offer in question and (b) any other substantive information available to them. The contracting officer shall award the contract to the apparent successful offeror[1] unless a conflict of interest or unfair competitive advantage is believed to exist that cannot be avoided or mitigated. Finally, before the contracting officer decides not to award a contract based on conflict of interest considerations, he or she shall notify the prime contractor, or the contractor rendering advisory and assistance services, and provide a reasonable opportunity to respond. Where the contracting officer finds that it is in the best interest of the United States to award the contract notwithstanding such conflict or unfair competitive advantage, the contract file should be documented to reflect the basis for that finding.

(e) Other information. This Policy Letter does not prohibit contracting officers from requesting other information relevant to the goals of this Policy Letter. In addition, in special cases, and if approved by the head of the contracting activity, the contracting officer may request that the certificates described above, be made with respect to a period as long as, but no longer than, 36 months preceding the date of the certificate.

11. Responsibilities of the Federal Acquisition Regulatory Council. All government-wide regulations to be issued pursuant to section 8141 of the Act will be provided to the Federal Acquisition Regulatory Council for review not less than thirty days prior to publication in the Federal Register for public comment.

12. Remedies. Persons required to certify in accordance with this Policy Letter's associated regulations but who fail to do so may be determined to be ineligible for award of a contract. Misrepresentation of any fact may result in suspension or debarment, as well as penalties associated with false certifications or such other provisions provided for by law or regulation.

13. Information contact. For information regarding this Policy Letter please contact Richard A. Ong, Deputy Associate Administrator, the Office of Federal Procurement Policy, 725 17th Street, N.W., Washington, DC 20503. Telephone (202)395-6810.

14. Effective date. The effective date of this Policy Letter is 30 days from the date of issuance on the first page.

15. Sunset review date. This Policy Letter will be reviewed three years from the date of issuance and every three years thereafter to ensure accuracy and relevancy. This review must include a reexamination of the threshold amounts in the light of any changes made in the small purchase amount provided for in FAR Part 13.

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[1] Chuck recommends deleting "to the apparent successful offeror." This may delete a somewhat infelicitous phrase but I think it would make our basic concept quite ambiguous and create big problems of interpretation.

DRAFT

ALLAN V. BURMAN
Deputy Administrator and
Acting Administrator

STATEMENT OF THE PROFESSIONAL SERVICES COUNCIL (PSC)
ON "GOVERNMENT USE OF PRIVATE CONSULTANTS"
BEFORE THE SUBCOMMITTEE ON FEDERAL SERVICES, POST
OFFICE AND CIVIL SERVICE
OF THE
SENATE COMMITTEE ON GOVERNMENTAL AFFAIRS
BY
PHILIP A. ODEEN AND WILLIAM A. MORRILL
NOVEMBER 17, 1989

Mr. Chairman, I am Phil Odeen, and I am pleased to appear on behalf of the Professional Services Council (PSC) before your Subcommittee this morning. I serve as Chairman of the Board of PSC. In addition, I am managing partner of the Washington consulting office of Coopers & Lybrand, one of the large international accounting firms. I am accompanied today by Bill Morrill, who serves on PSC's Board of Directors. Bill is President of Mathtech, Inc., a PSC member-company that provides technical and economic consulting and research to government and commercial clients in the U.S. and abroad. Bill also is involved actively in the Council for Excellence in Government, where he recently completed his tenure as Chair of that august organization.

PSC represents well over one hundred companies and firms, as well as other associations. PSC members include research and development firms, independent laboratories and test facilities, program analysis and evaluation companies, architect and engineering firms, systems integration and support activities, computer software development, and public accounting firms, among others.

PSC appreciates the opportunity to testify today, and we thank you for the invitation. As discussed with the Subcommittee staff prior to the hearing, we do not plan today to critique your bill, S. 166, the "Consultant Registration and Reform Act of 1989," and/or the policy letter issued by the Office of Federal Procurement Policy (OFPP) pursuant to Section 8141 of the 1989 Department of Defense Appropriations Act. However, we would be happy to provide you with our comments on both proposals for the record, if you would like. Instead, we would like to share with you our ideas for attacking the problems which these proposals seek to redress.

Mr. Chairman, we believe there is much common ground in industry's position and yours -- the desire to upgrade the federal work force through improved pay, recruitment, retention, training, and incentives; the need for a better understanding of the proper relationship between in-house capability and the use of outside contractors; and, the need to refine organizational conflict of interest standards and disclose relevant information. Finally, more time and effort need to be devoted to how the government defines professional and technical services, and controls and manages those services.

I. THE FEDERAL GOVERNMENT'S ESSENTIAL MANAGEMENT/ TECHNICAL CAPABILITY MUST BE ENHANCED/MAINTAINED

PSC joins those Members of Congress and those in the Bush Administration who see the urgent need for a highly competent corps of federal employees -- careerists and appointees alike -- to staff essential management and technical functions of the federal departments and agencies. PSC further pledges to support needed actions to enhance and maintain that capability. Indeed, I should point out that several individuals involved in PSC also are Principals of the Council for Excellence in Government and, as Principals, are working on this issue through the Council.

Professional and technical services companies are labor-intensive. Their assets are the knowledge and experience of their management and technical work force. They pride themselves and are judged on the quality and value of the services they deliver to federal clients. They also fully recognize the importance of highly-skilled, ethical, and fair-minded federal employees who design, procure, and monitor the purchase of goods and services from the private sector. They operate successfully in an environment where sound practices and qualified federal employees predominate. They know the damage that can occur when weak practices and personnel predominate.

The government faces a real dilemma. At a time when developments in new technologies, especially in the information and telecommunications areas, are accelerating, government agencies are finding it harder and harder to recruit and retain highly qualified individuals. The problem is especially acute with respect to professionals in such technical fields as mathematics, engineering, applied sciences, systems integration, technology assessment, information management, telecommunications, and data processing.

Not surprisingly, these areas are a strong and growing element in federal services procurement, as new technologies, professional disciplines, and new ways of doing business (e.g., systems integration) are introduced at a breathtaking pace.

There simply are not enough highly qualified management, technical, and procurement professionals in government to meet these increasingly complex and rapidly changing needs for expertise.

We believe that extraordinary measures are needed immediately to enhance and maintain the government's essential management and technical capability. We do not pretend to have the perfect solution. But, we believe that the primary factors that attract and motivate people must be addressed at a fundamental level. We see four areas where major changes are essential if we are to reverse the "talent drain."

-- First, we must correct the pay problem, especially at senior levels. The federal pay gap at senior levels is a true national crisis. A solution to restore the purchasing power of federal salaries at senior levels and keep them current is needed now. The pay issue for senior officials is linked, of course, to the congressional pay caps, and actions to raise the levels of pay significantly now before Congress deserve your full support. Pay comparability is not the only significant federal compensation issue. Others include ways to reward merit, promote the best performers rapidly, and provide financial incentives for outstanding performance.

-- Second, recruitment and retention matters deserve much greater priority. We need more vigorous programs for recruiting new talent, while evaluating and rewarding existing senior staff. Despite budget cutbacks, the federal government needs to mobilize its efforts to claim its share of talent if we are to have an effective government structure.

-- Third, we must meet the need for challenge and opportunity in the workplace. Many highly talented men and women will pursue government careers, despite pay disadvantages, if the work is exciting and rewarding. If we are to provide these challenges and opportunities, especially for people involved in the acquisition process, we must resolve the growing frustration in dealing with ever more arcane and complex regulations, which minimize the opportunities to use judgment and skills in their area of

responsibility, forcing them instead to focus on numerous procedural hurdles and paperwork demands. This situation is compounded by the ever growing number of auditors and inspector-general personnel involved in the process, and their encroachment into areas that in the past were responsibilities of contracting or technical personnel. I should note that this problem was well-documented by the Packard Commission.

-- Finally, we must reevaluate the steady "politicizing" of the federal service. Senior jobs that once were open to the career force, now routinely are filled with political appointees. This eliminates opportunities for ambitious and skilled individuals, while adding layers of supervision and review that cause frustration and seldom add value to the process.

The current environment drives away the "best and the brightest." It diverts attention from basic missions, discourages innovation, initiative and good judgment, and overemphasizes attention to prescribed procedures.

We also need sound processes and systems to conduct government business. PSC has proposed a number of improvements to the basic procurement process. We believe that a thorough review of management processes, including acquisition processes, as recommended by the Packard Commission and Secretary Cheney's "Defense Management Review," is in order to eliminate useless, burdensome and peripheral activities. Such a review will improve performance and contribute to the enhancement and maintenance of the federal government's essential management and technical capability. In the end, a highly competent and dedicated government work force is the best safeguard against waste, fraud, and abuse.

II. THE RETENTION OF POLICYMAKING/DECISIONMAKING FUNCTIONS OF GOVERNMENT IS IMPERATIVE

Closely related to the need for capable management and technical staff is another fundamental public-policy issue: what is a government function and what is appropriately a private-sector function?

PSC believes that policy-determination and decisionmaking functions must be retained by government and exercised by government

employees. PSC also believes that technical and managerial direction of federal programs, financial management, and regulation are functions that should be performed exclusively or predominantly by government employees. However, there is a subtle dimension to this simple principle which requires careful treatment.

For both defense and civilian agencies, professional and technical services firms provide important services and sometimes critical help to government employees in fulfilling their agency mission(s). This assistance includes data gathering and analysis, as well as research, analytical, and evaluation support in developing policy and implementing strategies and programs. We believe that this is an appropriate and effective use of our value-added service, as long as the ultimate policy decisions are made by the government.

Our support for the use of private-sector capabilities in critical areas of federal activity should not be confused as favoring "contracting out" the entire government. We hold no such view. Even in those areas where we believe continued or broader uses of external resources would be beneficial, we firmly believe that federal activities must be staffed by competent and effective personnel. As taxpayers and citizens, we deserve no less. We may argue about who should do what, but we all should insist that whoever has the assignment does a first-rate job.

III. ORGANIZATIONAL CONFLICT OF INTEREST CLAUSES SHOULD BE "TAILORED" TO SPECIFIC FACTS AND CIRCUMSTANCES

Mr. Chairman, I now would like to turn to a problem that we know is of concern to the Subcommittee as well as to the professional and technical services community -- organizational conflict of interest. The problem of conflict of interest has been a matter of concern both to the government and to the federal contracting community for many years. Government regulations in this area have been on the books for several decades, and new laws and regulations have been passed and/or promulgated in recent years. Yet, no one is happy with the present situation.

Some in government and the public-at-large believe that industry routinely takes advantage of the acquisition process to benefit corporate interests, at the expense of the government and taxpayer. Some in industry, on the other hand, feel that conflict of interest is an illusory issue that has been overemphasized -- one of perception,

not fact. Moreover, efforts to remedy the situation have caused the acquisition system to become overburdened, without meaningful benefits to the government or the taxpayer.

We recognize that conflict of interest is a factor in today's acquisition process, and that it must be dealt with in a responsible and constructive manner that benefits both the government and the federal contracting industry. Responsible companies do not want to become involved inadvertently in a conflict of interest situation. The penalties to the company financially, the implications for the company's reputation and integrity, and the impact on employee morale and sense of professionalism give a company ample incentives to avoid potential conflicts of interest.

Another factor that makes it prudent to avoid potential conflict of interest situations is the highly competitive nature of the professional and technical services industry. A company's competitors almost certainly would bring any potential conflict of interest to the attention of the procuring agency, with the intention of reducing the number of competitors for the award.

Very simply stated, sound business practices dictate that any well-managed, reputable, professional services company avoid potential conflicts of interest, when bidding on a Request For Proposals (RFP) or executing a task order that could expose it to charges of conflict of interest.

As we all are aware, the issue of conflict of interest -- whether an actual conflict of interest or a perceived one -- is a complex subject. Even more difficult is the process of attempting to separate those situations where an actual conflict of interest exists from those where there is an appearance of conflict of interest, but where in reality, no conflict exists. Perceived conflicts of interest are difficult to define because they frequently exist only in the "eyes of the beholder." Given the complexity of today's modern systems -- involving sophisticated equipment, complex software programs, diverse services and providers, coupled with the nature and requirements of the present federal acquisition process -- it is not easy to define situations that lead to real or potential conflicts of interest.

Nevertheless, PSC believes that there are categories of "performance conditions" where there is a potential for conflicts of interest. We

would describe these categories of performance conditions along the following lines:

* Situation #1: A contractor provides certain professional and technical services to a government agency and, at the same time, to a government contractor as a subcontractor or under a teaming relationship. The services provided to both parties involve identical substantive, technical, operational, and management advice or assistance on the same program/project.

* Situation #2: The contractor participates in some aspect of the conceptualization or development of a system, subsystem, or component for the government or another contractor, and later assists the government in the test and evaluation of the final product as a system, subsystem, or component.

* Situation #3: The contractor provides some form of feasibility study, system engineering, system design, test and evaluation analysis -- leading to a recommendation to the government -- when the contractor's parent company, or some other part of the contractor's organization, or a company in which the contractor has a material ownership position, is capable of implementing the recommendation.

The Federal Acquisition Regulation (FAR) Subpart 9.5 describes certain functional activities which could give rise to a conflict of interest, namely -- providing system engineering and technical directions; preparing specifications or work statements; providing technical evaluation or consulting services; and, obtaining proprietary information. These activities, when related to the performance conditions described above, should provide sufficient latitude to permit effective case-by-case "tailoring" of organizational conflict of interest clauses that reflect or satisfy contract requirements.

In our opinion, individual tailoring by competent acquisition personnel represents the key discipline needed to avoid real or perceived organizational conflicts of interest. It has been our experience that case-by-case tailoring of organizational conflict of interest clauses protects both the government's and the contractor's interest very adequately, and seldom results in a problem. The issues are too complex and depend too heavily on the exact circumstances to rely on legislation and/or regulation to spell out

potential conflict situations. Only sound, well-informed judgments by government personnel will work in practice.

In recommending this approach, we realize that for this process to work effectively, there needs to be adequate disclosure of information to the contracting officer by bidders. The acquiring of such information by the government should take place as a normal part of the RFP/proposal process. It should be in sufficient detail to enable the contracting officer to make a proper judgment, without placing an onerous administrative burden on bidders or inundating government acquisition officials with unnecessary details. The acquisition process already is badly overburdened. Let us not make it worse.

While broad and general principles of conflict of interest can be set forth in legislation or regulation, the specific information needed to determine possible conflicts of interest can be determined best in relation to the specifics of a particular RFP. The requirements probably should be a part of the government's RFP, and the response a part of the bidder's proposal.

In sum, PSC believes that the most realistic and administratively-feasible solution is one that combines a clear definition of those performance conditions which may engender organizational conflict of interest situations, with the notion of RFP-specific, tailored conflict avoidance requirements. To not provide the contracting officer with this RFP-specific, tailored option would limit seriously the number of qualified bidders -- to the detriment of the program involved and the taxpayer.

IV. AN IMPROVED DEFINITION OF PROFESSIONAL AND TECHNICAL SERVICES MUST BE DEVELOPED

Finally, this Subcommittee has expressed much interest and concern regarding how professional and technical services are managed by the federal government. As we see it, the motivation for this interest, over the past ten years, has been varied, and has included such considerations as: Are the dollars being spent for productive purposes? Should the work be done in-house? Is the total contract-service resource being well-managed? Is there a significant organizational conflict of interest problem?

Underlying these lines of inquiry is an unresolved and contentious issue regarding how the government defines professional and technical services and, subsequently, manages those services and controls the financial resources applied to such services. Unfortunately, there is no coherent, universal definition of professional and technical services within the federal government. There are several disconnected definitions and tracking systems that cover portions of these services, including -- the Office of Management and Budget (OMB) Circular A-120; the Federal Procurement Data System; the Defense Department's PB-27 memorandum supporting the budget process; and, the recently created Standard Industrial Classification (SIC) Code Major Group 87.

Although all of these are imperfect, SIC Code Major Group 87 comes closest to identifying most professional and technical services. PSC provided extensive input for the identification of professional and technical services for the 1987 SIC Code revision effort. Many, but not all, of our recommendations were adopted by the government. The next revision of the SIC Code is scheduled for 1992.

PSC continues to encourage the improvement of basic economic and statistical data as a long-term, ongoing, and evolutionary process. This information is invaluable to both government and the private sector in assessing industry-wide developments, analyzing areas of growth and trends for the future, and developing policy options that impact the competitiveness of U.S. companies in the international market.

We believe it is feasible to create a single, comprehensive, and coherent definition and information system for professional and technical services. Ideally, such a system could respond to government's planning, programming, budgeting, and procurement functions, and improve internal management within federal departments and agencies.

However, we recognize the difficulties of dealing with different classification systems designed for different purposes. For this reason, we do not at this time propose using one or another of the existing systems for this purpose, until an overall plan is developed carefully.

Ultimately, the only way to create such a system may be by legislative mandate. Responsibility for coordinating the development

of such a system might be shared by an inter-agency task force with input from the private sector. The implementation and operation of the system then would be assigned to a single executive agency. The Department of Commerce has the government's primary statistical-gathering resources. OMB has the responsibility for budget, statistical, and regulatory functions. The General Services Administration administers the Federal Procurement Data System. Given their respective responsibilities, all should be part of the development of such a system.

The importance of sophisticated statistics and data cannot be emphasized too strongly. They represent the basic "building blocks" which are needed by government to develop constructive policy initiatives. Better classification schemes and data will make more informed decisions possible. Informed policy decisions relating to the professional and technical services sector of the economy will promote competitiveness, will build needed in-house capabilities to manage applications of new and emerging technologies, and will encourage government to use capabilities in the private sector effectively in meeting national goals. In short, better information will move all parties beyond the sterile debate about "consultants."

V. CONCLUSION

In the October, 1989, issue of *Government Executive* magazine, an excellent article appeared entitled, "Hollow Government." As the article pointed out, in this era of budget austerity, federal agencies increasingly are unable to perform the missions for which they were created.

The article notes that federal managers who were surveyed indicated that their ability to hire enough managers has worsened considerably in the past five years, and that this predicament is part of the recruitment and retention problem affecting much of public service. The article concludes on an ominous note, stating that "...as long as the federal government continues to pay its employees an average of 29 percent less than the private sector, and much less for some technical and senior positions, the Hollow Government probably will echo ever louder."

PSC believes that essential management and technical capabilities within the federal government have deteriorated and should be enhanced and maintained. The measures we think appropriate are

broadly applicable, but we understandably give special attention to some of the problems we know best -- i.e., the government's ability to procure professional and technical services.

Accordingly, the overall quality and professional competence of the government's procurement work force is of primary concern to PSC. PSC believes that establishing educational and training requirements for government procurement professionals is essential, as well as providing the compensation, recognition, and other incentives to attract and retain quality personnel. It has been PSC's long-standing belief that having properly-trained and -motivated government procurement personnel in place is absolutely imperative if we are to achieve procurement improvements.

We are interested in working with the Subcommittee on addressing the deteriorating essential management and technical capability and professionalism within the government's procurement work force -- a subtle, but major, threat to the government's ability to acquire successfully high technology-based professional and technical services.

We also look forward to working with the Subcommittee on the other issues we raised today -- issues which we believe deserve intense deliberations among government and industry leaders.

Thank you again for the opportunity to present our views to the Subcommittee. We would be pleased to respond to any questions.

QUESTIONS FOR THE RECORD
MR. PHIL ODEEN
PROFESSIONAL SERVICES COUNCIL

1. Do you have any suggested modifications to section 10 of S. 166?

2. Do you have any suggested modifications to the final draft of the OFPP policy letter?

PROFESSIONAL SERVICES COUNCIL

Representing companies that are creating the future through innovation, technology and ideas

Philip A. Odeen
Chairman

Christopher T. Cross
Vice Chairman

Mark Schultz
President

December 21, 1989

The Honorable David Pryor, Chairman
Subcommittee on Federal Services, Post Office, and Civil Service
Committee on Governmental Affairs
Room 601, Hart Senate Office Building
United States Senate
Washington, D.C. 20510-6250

Dear Senator Pryor:

On behalf of Philip A. Odeen and William A. Morrill, who testified on behalf of the Professional Services Council (PSC) before your Subcommittee on November 17, 1989, on the subject of consultant registration, please accept our thanks for the opportunity to present our views on this issue. We especially appreciate the courtesy extended by you to our witnesses, and the cooperation demonstrated by your staff throughout the hearings process.

As requested, please find enclosed two copies of the transcript of our testimony, with our corrections noted.

Please find below our response to the two questions posed in your letter to us of December 5, 1989.

After conducting a preliminary review of the final policy letter on "consultants and conflicts of interest" as promulgated on December 18, 1989, we are in overall agreement with the intent of the OFPP policy letter on "consultants and conflicts of interest." Although it will be difficult for industry to implement, the policy letter is a balanced and thoughtful effort to obtain the information necessary to prevent organizational conflicts of interest.

As PSC testified, in response to your question during the hearing, "the final policy that OFPP put out is something that we can support."

However, there are at least two areas where we would support further changes in the policy letter. For example, we feel that there is a need to clarify the definitions of the various "advisory and assistance services" covered by the policy letter. We also support additional safeguards to ensure the non-disclosure of all "sensitive" business and other information submitted.

Even though PSC does not believe that legislation is warranted at this time, we have reviewed Section 10 of your consultant registration bill, S. 166. PSC continues to believe that a "disclosure requirement" that would place a less onerous burden on industry, as well as on the government, yet serves identifiable public interests and purposes, should be implemented.

Moreover, since the issue of gathering and disclosing data is a complex problem, PSC continues to believe that it would be more appropriate to promulgate any new

World Center, 918 16th Street, N.W., Suite 406, Washington, D.C. 20006, Phone: 202/296-3030, Fax: 202/296-2035

requirements through the normal rulemaking process. This provides an opportunity for the interested public to participate in the process and to revise the procedures as experience is gained.

PSC's most basic concern with Section 10 is that the Section is extremely vague and sweeping in scope. For example, the term "conflict of interest" is nowhere defined in the legislation. Indeed, the contractor firm or individual "consultant" essentially is forced to decide itself what work is "directly related" and could be a possible conflict of interest. What exactly is the contracting officer supposed to be looking for in reviewing the materials a covered company may have to file as a registrant? If the contracting officer sees something that could be a conflict, what does he or she do, and how does a registrant respond if the registrant disagrees?

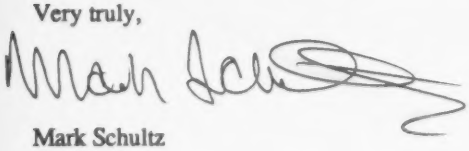
By not defining what is meant by "conflict of interest," the sweep of information required to be filed has no relationship to the problem the legislation seeks to solve. Indeed, the amount of information to be filed is excessive and, therefore, effectively useless.

Section 10 also would provide an entirely new set of opportunities for firms whose bids are rejected to file protests challenging contract awards. This already is a problem bedeviling the system, but the flood of new information, and the vague definition of conflict of interest -- let alone the difficulty in defining a true conflict of interest -- will be a rich source of protests and related litigation.

Finally, PSC is concerned about the confidentiality of the information companies would have to report. For competitive reasons, covered companies are most reluctant to submit long lists of clients and descriptions of the work they are doing for them.

In closing, let me thank you again for the invitation to testify before your Subcommittee, and let me reiterate that we look forward to working with you and your staff on this and many other issues of mutual concern. Please accept our best wishes for a happy holiday season!

Very truly,



Mark Schultz
President

Enclosures

cc: Mr. William A. Morrill
Mr. Philip A. Odeen
The Honorable Ted Stevens

MS/lj

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LEONARD WEISS, STAFF DIRECTOR
TO ANNE BARNHART, MINORITY STAFF DIRECTOR

United States Senate
COMMITTEE ON
GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510-6250

November 17, 1989

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

I am writing to request your full support for a soon-to-be issued Office of Federal Procurement Policy (OFPP) proposal on consultant registration. This is an issue that concerns the very integrity of our federal government. Underlying the scandals at the Departments of Defense and Housing and Urban Development is the fundamental matter of who is running our government.

Since my investigations began in 1980, I have found that private consultants and contractors have become increasingly involved in performing the basic work of the government. What makes this trend especially troubling is that these same private companies also provide services to clients that could be affected by actions of the government agencies the companies are advising.

As a first step to address this problem, last fall I offered an amendment to the Defense Appropriations bill to require consultants to disclose their clients to the agencies. The OFPP has been working on implementing my proposal and will soon issue a Policy Letter establishing the registration framework. Regulations would be promulgated within the next 180 days.

I have listened with interest as you have spoken out on behalf of the career government workforce. While I too believe in the need for a competent and dedicated official workforce, I am convinced that we will not have an effective government until we begin to understand the nature of the workforce that does the basic work of government. At present, we have detailed information on one part of the workforce, the civil service. Current law requires that those who serve the government as officials disclose relevant private interests and precludes these officials from performing governmental work in conflict with their private interests.

We have found that private contractors increasingly work side-by-side with officials in the performance of the government's work. However, top agency management does not have the most basic information on this private workforce such as the number of private consultants who are working for them. Consultants are permitted to work simultaneously for clients other than the federal government. In fact, they are typically not even required to disclose their private domestic or foreign interests so that the government might act to limit potential for conflict.

It has become the norm that officials merely manage contracts while consultants do the important and interesting work; consultants are paid more than government officials; and consultants are not limited by the ethical codes and disclosure requirements that cover public officials. How can the government expect to retain a capable official workforce needed to manage increasing federal responsibilities?

While obtaining basic information about this private sector bureaucracy that is replacing our government will not solve all the problems, it is a necessary piece of the puzzle. It is a sensible first step toward reexamining the philosophy of our government as we prepare for the 21st century. I therefore strongly encourage you to support the implementation of effective regulations to bring about consultant registration.

Thank you for your consideration. I look forward to working with you on this matter.

Sincerely yours,

David Pryor

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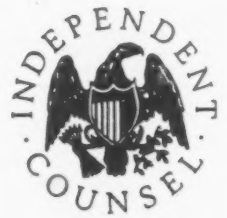
EXECUTIVE BRANCH LOBBYING



Report to Congress
by Independent Counsel
in the Michael Deaver Case

Title 28, United States Code, Section 595(a)(2)

Section 595. Congressional oversight

(a) Oversight of conduct of independent counsel

* * *

(2) Reports to Congress

An independent counsel appointed under this chapter shall submit to the Congress such statements or reports on the activities of such independent counsel as the independent counsel considers appropriate.

EXECUTIVE BRANCH LOBBYING

Report to Congress on the Nature, Effects and Need for Regulation of Executive Branch Lobbying

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I. INTRODUCTION

On May 29, 1986, a division of the Court of Appeals for the District of Columbia Circuit appointed Independent Counsel to investigate whether former Deputy Chief of Staff and Assistant to the President Michael K. Deaver had violated the provisions of the Ethics in Government Act, 18 U.S.C. Section 207, or any other provision of Federal law. The appointment was requested by the Deputy Attorney General of the United States,[1] by members of the Senate Judiciary Committee, and by Mr. Deaver himself.

The investigation resulted in Deaver's indictment for perjury in sworn testimony about his lobbying activities before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce of the House of Representatives (chaired by John D. Dingell) and before a Federal grand jury. In December 1987, Deaver was convicted by a trial jury on three counts of the five-count indictment. Deaver was sentenced to a prison term of three years, on which execution was suspended by the trial judge, and was ordered to pay a fine of $100,000. He was placed on probation for three years, during which he was prohibited from lobbying the Federal Government for profit and required to perform 1,500 hours of community service. Deaver filed an appeal but later withdrew it, and he is currently on probation and performing the community service imposed by the District Court.

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1 The application was submitted by the Deputy Attorney General because the Attorney General had recused himself from the matter. *See* 28 U.S.C. Section 591(c).

The statute creating the office of Independent Counsel directs the Independent Counsel to report to Congress as and when appropriate. 28 U.S.C. Section 595(a)(2). This report is submitted pursuant to that authorization.

A. The Ineffective Regulation of Lobbying: The Shortcomings of Section 207

At the time of appointment, Independent Counsel was directed to investigate what was thought to be a particularly egregious example of Executive Branch lobbying by a former White House official. As previously pointed out to the Judiciary Committees of both Houses of Congress, the shortcomings of the statute, 18 U.S.C. Section 207 -- combined with Deaver's false testimony -- made prosecution of Deaver for violating its provisions impossible.[2] The principal defects in the statute as it then existed were as follows:

1. White House Compartmentalization

In 1982, the Office of Government Ethics ("OGE"), responding to a request from the White House Counsel, issued an order dividing the White House into nine separate "statutory agencies." Since the main feature of the statute was to prohibit a former employee from lobbying his "former agency," the effect of the OGE compartmentalization order was to grant Deaver a blanket exemption for contacts with most of the key White House officials with whom he had worked regularly as Deputy Chief of Staff and Assistant to the President.

2. Use of Intermediaries

The Ethics in Government Act ("EIGA") was expressly intended *not* to prohibit former high government officials from using emissaries to influence their former agencies. Even where a former official employed his own former staff aides for his lobbying business and used them to carry personal messages to his former agency, such conduct was exempt under

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2 See letters to Judiciary Committee Chairs dated December 18, 1987.

Section 207 if the aides' government salaries -- as was usually the case -- had been below the grade of GS-17.

3. "Social and Informational" Communications

Section 207 authorized administrative interpretation of its operation in separate regulations, which expressly permitted "social or informational" communications. Such communications provide a perfect method for a lobbyist to convey his personal interest in a particular matter to one of his former colleagues simply by inquiring about its status or by mentioning it during a "social" conversation.

4. Job Switching

The statute did not prohibit a former high official from lobbying a former government colleague who had moved to a different agency, no matter how close their personal relationship.

5. "Particular Matter" Requirement

The express language of Section 207 prohibited only communications relating to a "particular matter" pending before the agency, or in which the agency had a direct and substantial interest. This qualification created extensive doubts over the section's applicability to specific situations and permitted a former employee to lobby an agency to become interested in a matter which previously had not been before it.

B. Strengthening the Regulation of Lobbying: A Registration and Reporting Requirement

In addition to eliminating these loopholes from the EIGA, Congress should consider a different approach to regulating Executive Branch lobbying. We suggest legislative consideration of a registration and reporting requirement for Executive Branch lobbying on behalf of domestic clients, similar to the FARA requirement applicable to the representation of foreign clients.

The initial disclosure of Deaver's activities, which led to the pressure for an inquiry, and ultimately to the appointment of

Independent Counsel, demonstrates the wisdom of such a reporting requirement. The Deaver story broke only after journalists scrutinized Deaver's FARA filings. The facts might otherwise never have come to light.

Lobbying abuses and secrecy are intertwined. That is why a reporting requirement makes such good policy. Secrecy was so important to Deaver that he felt compelled to conceal and lie about his activities even while testifying under oath.

Two significant facts underscore the importance that secrecy plays in Executive Branch lobbying:

1. As soon as Deaver's activities received public attention, Deaver's clients began to desert him. So significant was this damage to Deaver's lobbying business that it resulted in the cancellation of a proposed multi-million dollar acquisition of his firm by an international conglomerate.

2. Deaver himself was so concerned about maintaining the secrecy of his dealings with White House and other Executive Branch officials that he was willing to risk prosecution and imprisonment to keep them from a congressional committee and a Federal grand jury.

Secrecy is important to successful Executive Branch lobbying from two points of view:

1. For business reasons, the client does not want publicity about its high-fee lobbying with government officials.

2. For political reasons, the Executive Branch official does not want publicity about his accessibility to high-fee lobbyists.

From the standpoint of the public interest, lobbying is most dangerous when it is carried on in secret, with no one representing the citizen-taxpayer or the public at large. This report recommends an antidote to lobbying carried out in secret. Drawing on facts from the public record of the Deaver case, the activities of this office, and other information in the public domain, this report discusses the widespread nature of lobbying activity similar to Deaver's, and the need for strengthened regulation of such activity through a registration and reporting requirement.

II. "BACK CHANNEL" GOVERNMENT

The Deaver case record, viewed against the backdrop of the conduct of similar lobbyists, reveals that present-day lobbying of the Executive Branch of the Federal Government is an unregulated, free-wheeling, essentially lawless activity that is damaging to public confidence in the government, and potentially harmful to the integrity of the governmental process.

Executive Branch lobbying is aimed directly at decision-making in the White House and the various Executive agencies. It is an activity which can accurately be described as "back channel" government because it circumvents the normal government procedures which apply to other citizens.[3] This back channel government is manipulated by a small number of Washington consultants who have special access to politically-oriented senior staff members in the Executive Branch. This special access is used to advocate the interests of high-paying clients.

To understand this back channel government, one needs to recognize that the nation's Executive is not simply a single individual elected by the people to serve as their President. The

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3 "Back channel" is the term used to describe the communications network to U.S. Embassies abroad which bypasses formal State Department oversight. See use of the phrase in a Black, Manafort client proposal quoted in the *Time* magazine excerpt on page 15.

President's personal staff alone is a substantial bureaucracy numbering several hundred. Senior staff members who are closest to the President wield immense power. In some administrations they determine what the President will be told, who the President will see, what he will say, where he will go, and what he will do. They directly influence the President's decisions and can tip his judgments in one direction or another.

In a government as complex as ours, it would be impossible to run the presidency without a large support staff. As a consequence, the welfare of the country is dependent in significant respects upon the ability, judgment and integrity of individual members of the President's staff. The same is true of other agencies in the Executive Branch. Agency heads must depend on their staffs to advise them on what to say or do in official matters.

When a new Administration comes into office, as many as three thousand new appointments may be made to fill top policy positions in the Executive Branch. Presidential staff people and Cabinet aides are a special breed, different from almost anyone else in government. Many of them have had little or no prior Federal Government experience. Many come into office by way of political positions in presidential campaigns. On the whole, they are people of talent and perform their particular tasks with skill. They also bring valuable insights and experience to Executive Branch operations. Yet they have one characteristic which sets them apart: their primary loyalty is to the President as a political figure, the person who was once head of their ticket and is now head of the government. Some of these staff people think and act like political "wheelers and dealers" rather than career public servants. They measure their achievements in terms of winning, of gaining an advantage, of increasing their own personal or political power. This is not true of all of them by any means, but it does apply to a sufficient number to be a significant factor in how the government functions.

Closely allied to these people is a special group of "government affairs consultants" who have private access to the White House and other senior Executive Branch staff. In number they are only a dozen or so firms, but they wield enormous influence

on government decisions involving the interests of their clients. These firms are mostly run by former presidential campaign aides. Because of their personal and political contacts with senior Executive Branch staff members, they are able to command substantial fees for their work. They prosper not necessarily because they are smarter or work harder than anyone else, but because they can provide "access" to those who influence presidential decisions and have the "clout" to request favors from them.[4]

These consultants often claim they are merely "technicians" whose service is explaining to clients how government works. But the size of the fees they receive shows that their clients believe they offer something of far greater value than merely technical advice on government operations.

Defense contractors, big business, and foreign governments are the principal entities who pay large retainers to these consultants in the confident expectation of receiving special consideration in matters that may involve billions of dollars of public funds.

Two of Deaver's high-paying clients were principal defense contractors: Rockwell International and The Boeing Company. His mission on their behalf was not to lobby Congress but to lobby the Executive Branch to help them win huge contracts, and to do so behind closed doors via the equivalent of the back channel.

There is nothing new about Executive Branch lobbying. One need only think back to the administrations of Presidents Ulysses S. Grant and Warren G. Harding to be reminded of the extraordinary potential for abuse that exists, and will probably

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4 There are, of course, hundreds of organizations, attorneys, and paid lobbyists who make presentations to administrative agencies in support of legitimate goals and who serve a useful public purpose, but they usually operate at the "line" level, dealing with career civil servants, where issues are decided on the merits. This report concerns itself with the high-priced lobbyists whose stock in trade is peddling personal political influence directly to agency heads and senior policy staff.

always be present to some degree. The fact that today's lobbying of the Executive Branch is an updated version of an age-old phenomenon, however, does not mean that it cannot be controlled.

The problem can be stated simply: a small group of highly-paid consultants is able to gain special privilege for its clients because of personal and political ties to senior staff members in the White House and other Executive agencies, including most major departments and key independent agencies in Washington. These consultants have direct "back channel" access to decision-makers in the Executive Branch that is not available to citizens at large. Unlike congressional lobbyists, Executive Branch lobbyists are not required to register or otherwise publicly disclose their activities, unless they represent foreign interests.[5] Their back channel access to government is not subject to any public accountability whatsoever.

Michael K. Deaver

The significance of the Deaver case from the viewpoint of governmental operations is that it provided a clear look at exactly how Executive Branch lobbying works, and what lobbyists are able to do despite the Ethics in Government Act. The case also revealed why Deaver was able to attract so many clients who were willing to pay him fees ranging from $100,000 to $500,000 per year.

Michael K. Deaver was a longtime personal friend of President and Mrs. Ronald Reagan from the days when Mr. Reagan was Governor of California. Deaver served in the Reagan presidential campaigns of 1976 and 1980 and then as a top aide to the President from 1980 until his departure from the White House on May 10, 1985.

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5 Criticisms have been directed at the ineffectiveness of congressional lobbyist reporting requirements, but this topic was not the subject of the Independent Counsel's investigation, and we therefore have no basis to make legislative recommendations. *See* Richard Cowan, "None Dare Call It Lobbying," *Common Cause*, March/April 1989, pp.13-16.

Prior to his White House departure, Deaver sought advice from experienced lobbyists about his prospects for setting up a successful consulting firm. He was told candidly that with his White House connections he would be able to charge 'top dollar.' Deaver was advised to restrict himself to a limited number of clients on substantial annual retainers, so he would not be bothered with billing and time records of his activities. Lobbyist friends assured him he would have no trouble attracting business. One even suggested that instead of soliciting clients after he left the White House he go fishing for a month and wait for the business to come to him.

Lobbyist James H. Lake had dinner with Deaver the night before Election Day in 1984. He advised Deaver to resign after the election was over so he could capitalize on his closeness to the President for the full four years of Reagan's final term in office.

Deaver followed Lake's advice. He even had discussions with Lake about joining Lake's firm. For a while he also considered going into partnership with Craig Fuller, with whom he had worked in a public relations firm prior to their White House service together. Fuller decided against the idea when Vice President Bush asked him to become his top aide in February 1985. During the discussions with Deaver, Fuller prepared a list of potential clients for their consulting business, projecting billings of $4 to $6 million.

Deaver was well on his way to that figure by the time his activities came under the scrutiny of the Dingell Committee. By the end of his firm's first fiscal year, January 31, 1986, only 8-1/2 months after he had left the White House, Michael K. Deaver and Associates had current retainer commitments of $3 million, and more in the offing. Deaver's top aides (William Sittmann, Pamela Bailey, and Doral Cooper) received a year-end bonus of $250,000 to be divided among them, as well as shares of the firm's stock, on top of their regular salaries.

Deaver's instant success was no surprise to Washington insiders. As word of his sudden wealth became public, knowledgeable reporters pointed out that Deaver was part of a growing cadre of ex-officials who were cashing in on their

government relationships. *Washington Post* reporter Haynes Johnson wrote a two-part series on the subject in April 1986. In one article, entitled "Rise of the 'Deaver Syndrome,'" Johnson identified the dual phenomenon of the new breed of Executive Branch officials who enter government so they can make money afterwards, along with the rapid growth in firms engaged in influence-peddling:

> More people appear to be drawn to government not as a career, but *as a means to cash in on their public service as quickly and profitably as possible*, according to lawyers and lobbyists. One observer described this as the desire "to do two years and then come out and make a big hit. They all think that they're going to be able to be bigger earners, bigger hitters, than they were before they went in. I'm not sure it works, but that's the mythology, that's the legend, and they do come [to town] with that in mind." (Emphasis added.)

On March 3, 1986, *Time Magazine* honored Mr. Deaver as the archetypal Washington lobbyist by featuring him on its cover, seated in a limousine, telephone in hand, accompanied by the caption "Who's This Man Calling?"

Other Prominent Executive Branch Lobbyists

The 1986 issue of *Time* featuring Deaver on its cover carried an article by Evan Thomas describing the activities of another active Executive Branch lobbying firm, Black, Manafort, Stone & Kelly:

> A lobbyist can perform no greater favor for a lawmaker than to help get him elected. It is the ultimate political IOU, and it can be cashed in again and again. No other firm holds more of this precious currency than the Washington shop known as Black, Manafort.
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> • • •
>
> The partners of Black, Manafort say that the lobbying and political-consulting functions are kept separate. "It's like a grocery store and a hardware store," insists Black. "You can't buy eggs at a hardware store and you can't buy tires at the grocery." Yet these are but fine distinctions in Washington, where the firm is considered one of the most ambidextrous in the business, *the ultimate supermarket of influence peddling*. "You are someone's political adviser, then you sell yourself to a corporation by saying you have a special relationship with Congress," says Democratic Media Consultant Robert Squier, who does no lobbying himself. Is it proper to get a politician elected, then turn around and lobby him? "It's a gray area," sidesteps Squier. Charges Fred Wertheimer, president

> of the public-interest lobbying group Common Cause: "It's institutionalized conflict of interest."
>
> It certainly is good for business. The partners charge six-figure fees to lobby and six-figure fees to manage election campaigns. As a result, they take home six-figure salaries. (Their stated aim is to make $450,000 apiece each year: they are assumed to have achieved it last year.) *They unabashedly peddle their access to the Reagan Administration.* The firm's proposal soliciting the Bahamas as a client, for instance, touted the "personal relationships between State Department officials and Black, Manafort & Stone" that could be "utilized to upgrade a *backchannel* relationship in the economic and foreign policy spheres." (Emphasis added.)

During 1989 congressional hearings into Executive Branch lobbying at the Department of Housing and Urban Development, partner Paul J. Manafort candidly described his activities in obtaining a potentially lucrative Federal housing contract as "influence-peddling." Committee Chairman Tom Lantos calculated that the firm's fee of $326,000 worked out to payment at a rate of $1,000 per hour. (*Washington Post*, June 21, 1989) Manafort won the contract for his client through his dealings with the executive assistant to the Secretary of HUD, with whom he had what he called a "political relationship."

The same issue of *Time* with the Deaver cover listed other former Executive Branch officials who had gone into the business of Executive Branch lobbying with notable success:

> Michael Deaver has a lot of company in other Reagan Administration officials who have left the public payroll to represent private interests in Washington. An alphabetical sampler:
>
> Richard Allen, former National Security Adviser, now represents Japan, and Taiwan shoemakers.
>
> Lee Atwater, another former White House aide, is a political consultant with Black, Manafort & Stone.
>
> Joseph Canzeri, former White House assistant to Deaver, has formed the Canzeri Co. to do Washington representation.
>
> Kenneth Duberstein, former legislative affairs liaison, is now with Timmons & Co.
>
> Robert Gray, Inaugural co-chairman for Reagan in 1981, started Gray & Co. immediately thereafter.

Christopher Lehman, onetime National Security Council staffer, is now with Black, Manafort & Stone.

Daniel Murphy, former Bush chief of staff, is head of Gray & Co.'s international division.

Lyn Nofziger, former political liaison, is a partner in Nofziger & Bragg.

Nancy Reynolds, longtime Reagan confidante and transition official, joined Wexler, Reynolds, Harrison & Schule in 1983.

Ed Rollins, formerly an assistant for political liaison, heads the Washington office of a consulting firm.

Richard Schweiker, former HHS Secretary, is president of the American Council of Life Insurance.

Sheila Tate, former press secretary to Nancy Reagan, is senior vice president of Burson-Marsteller, a public relations and lobbying firm.

Peter Teeley, former press aide to Bush, started his own p.r. and foreign-representation firm.

Lee Verstandig, former Under Secretary of HUD and briefly Nancy Reagan's chief of staff, has joined Deaver & Associates.

A recent striking example of how lobbyists refresh their "access" to new administrations can be seen in the case of James H. Lake, who served as unpaid Director of Communications in the Bush 1988 presidential campaign. Lake was the person who encouraged Deaver to leave the White House after the 1984 campaign to take advantage of his close ties to the Administration. Lake gave the following definition of 'lobbying' during his testimony at the Deaver trial :

> Lobbying is to make a direct appeal to a member of the executive branch of government or a member of Congress to try to persuade them to direct action for or against whatever it is you're trying to do, to vote for a bill, to vote against a bill, to approve policy or disapprove policy, go directly to the policy-making official responsible and ask for his support or lack of it or to support or oppose. That's lobbying.

According to a report in the *Washington Post* of August 19, 1988:

> Lobbyist James H. Lake, while serving as a key campaign adviser to Vice President Bush, has been helping a California rice-farmers' cooperative try to persuade the U.S. Maritime Administration (MarAd) to drop or reduce a $3 million ship-leasing default claim.

The story went on to report the comments of a campaign spokesman:

> Mark Helmke, a spokesman for the Bush campaign, said from New Orleans yesterday he did not know whether top campaign officials knew of Lake's private work before government agencies while serving as a campaign adviser.
>
> "I assume they know about it and don't object to it," Helmke said. "Jim gives free campaign advice, and he consults for private clients. He does not trade off of his relationships. Those who do usually don't last very long .... *I can look around this room and count half a dozen nonpaid campaign advisers who are in the consulting business.*" (Emphasis added.)

These half-dozen nonpaid campaign advisers in the consulting business will be in a unique position to use the back channel to ply lucrative Executive Branch lobbying business throughout the current President's term in office.

Another prominent Executive Branch lobbyist is Craig Fuller, Deaver's proposed lobbying partner back in 1985. Fuller's name surfaced in Deaver's telephone log during the Deaver prosecution as the man who engineered insertion of a key paragraph supporting special tax treatment into a speech given by the Vice President. The language had been drafted by one of Deaver's clients. Following the 1988 election, Fuller left his position as the former Vice President's chief of staff to join the lobbying firm now known as Wexler, Reynolds, Fuller, Harrison and Schule. In a newspaper account on January 19, 1989, Nancy Reynolds, a name partner, was candid about the firm's courting of Fuller:

> "While a lot of people understand the process, no one has had an exposure quite like Craig's. We've known him for the last 12 years and we've been dropping hints [for him to join us] for the last five."

During four of those five years of "hints" Fuller was chief of staff to the second highest government official in the Executive Branch.

Probably the most significant fact about present-day Executive Branch lobbying was the reaction of unofficial Washington to the initial Deaver disclosures. Meg Greenfield, in an article in the *Washington Post* on April 15, 1986, reported:

> What interests me about this is the way *haute* Washington has responded. with confusion -- moral, legal and professional. The town has been a virtual seminar, friends as well as enemies of Deaver trying to determine just where and how he may have gone beyond the ever-loosening bounds of what is acceptable here these days. Maybe, and this is the important part, he didn't. When Deaver's supporters say (1) everybody does it and (2) he broke no law, they are invoking the preferred Washington defense of the 1980s. Standards of propriety have been so radically weakened that damn near everybody *does* do it, and absent a law's being broken, the "it" in all this, whatever it is, is considered to be all right. In Jimmy Carter's time as well as Reagan's, individuals known to be especially close to the president enjoyed enormous, sudden business success in this town, their wallets along with their Washington operations simultaneously growing fat. So this is not a party thing. It is ecumenical.

Following Deaver's conviction, the editorial page of that same newspaper said that what Deaver did "is done every day in this town." The lead editorial in the *Washington Post* on December 19, 1987 -- two days after the Deaver jury verdict -- commented:

> *What Michael Deaver did -- not the lying, but the influence-peddling -- is done every day in this town. At a certain level you could argue that our system of government both presumes and even depends a little on this constant plucking at its sleeve.* Some of the people professing to be most aghast at Mr. Deaver's behavior either do the same things themselves (and would do more if they could) or well know others who do, whom they greatly admire.
>
> *Mr. Deaver's sins, if sins they were, were less in kind than in degree.* He went too far, but the lines in this swamp are blurry. Even as you look, they move. The preachily titled Ethics in Government Act, whose strictures on lobbying are what got him into trouble -- though he was never officially accused of having violated them -- is *feel-good legislation.* It tries to bottle air. (Emphasis added.)

"Bottling air" captures Washington's cynical attitude toward efforts to control privileged access to government. It will take considerable political courage and determination for Members of Congress to overcome this laissez-faire mentality and develop effective legislative reforms to bring Executive Branch lobbying out into the open.

III. HOW EXECUTIVE BRANCH LOBBYISTS WORK

On October 27, 1985, a few months after Deaver opened his lobbying firm, the *Washington Post* reported:

> One of Deaver's clients, who asked not to be identified, said: "When you're a company near the top of the Fortune 500 in the middle of a takeover battle, paying a couple of hundred thousand dollars to get someone who can call the Secretary of the Treasury is *just a drop in the bucket*." (Emphasis added.)

What does a high-priced Washington public relations firm do for its "drop in the bucket"?

That question was posed by Mary McGrory in a *Washington Post* column published on February 20, 1986, discussing Deaver's retainer to represent the government of South Korea.

> We don't know what Deaver does for his $2 million. He declines to say. But we are free to speculate. Did he tell Chun to call off his goons and did Chun tell him to mind his own business? *What does a high-priced Washington public relations firm, staffed with former campaign aides, do for its customers?* (Emphasis added.)

The Deaver trial provided very precise answers to this question: Deaver was hired to help improve South Korea's trade relations with the U.S. The very first thing Deaver did was to arrange for the Korean trade representative to meet personally

with the President of the United States – rare access for anyone below the rank of "head of state". The trade representative handed the President a letter purportedly from Korean President Chun -- a letter actually conceived and drafted by Deaver's own staff. This proof of "access" to the White House cemented a contract for the Koreans to pay Deaver's firm $475,000 a year.

How did Deaver achieve this result?

First he asked the U.S. Ambassador in Korea to contact NSC staff member Gaston Sigur in the White House to set up an appointment for the Korean trade representative to meet with the President. When Chief of Staff Donald Regan vetoed the request, Deaver next went directly to the NSC deputy chief, Admiral John Poindexter, who agreed to help. Poindexter persuaded NSC chief Robert McFarlane and McFarlane persuaded Regan to let the Korean come in on "NSC time" instead of using up time on the President's regular daily schedule. So the Korean representative got his audience, delivered the letter drafted by Deaver's staff, and Deaver clinched the $475,000 a year contract with the Korean government.

How did Deaver go about lobbying for his other clients?

TWA: TWA management hired Deaver to help stall a threatened corporate takeover by Carl Icahn. In performing for TWA, Deaver did the following:

- Made a telephone call to Secretary of Transportation Elizabeth Dole at the Department of Transportation

- Made a call to Presidential Assistant Roger Porter at the White House (a call that Porter rebuffed)

Fee: $250,000.

Smith Barney: Smith Barney hired Deaver to help preserve the tax loophole for companies investing in plants in Puerto Rico. To accomplish this, Deaver did the following:

- Met privately with Treasury Secretary James Baker at his home

- Met and talked socially with National Security Adviser Robert McFarlane in the White House

- Met and talked privately with Secretary of State George Shultz at the State Department

Fee: $200,000.

Boeing: Boeing hired Deaver to help it win a $250 million dollar contract to build a replacement for Air Force One, the Presidential aircraft. In performing his lobbying function, Deaver:

- Had a breakfast meeting with the deputy director of the White House Military Office, General Matthew P. Caulfield at the Four Seasons Hotel, followed by a second meeting in Deaver's office

- Made an informational telephone call to Dennis Thomas, Deaver's successor in the White House

Fee: $250,000.

Rockwell International: Rockwell hired Deaver to help it sell approximately sixty more B-1 bombers to the Department of Defense (at a price tag of about $200 million each) and to support a 1987 NASA budget request for the Space Station (total contract cost about $8 billion). Deaver lobbied for these programs by:

- Meeting with Budget Director James Miller at the OMB office

- Telephoning NSC staff member Gerald May at the White House

Fee: $250,000.

Canada: Canada engaged Deaver to help advance its acid rain goals. Deaver lobbied on Canada's behalf by

- Making several 'social' phone calls to U.S. Special Envoy Drew Lewis and attending a meeting with Lewis at the private River Club in New York City

Fee: $100,000.

South Korea: Korea hired Deaver to improve its trade relations posture with U.S. officials. Deaver personally lobbied for this objective by:

- Arranging an audience with President Reagan for Korea's Trade Representative

- Meeting privately with U.S. Trade Representative Clayton Yeutter on two occasions

- Meeting with NSC staff member Gaston Sigur

Fee: $475,000.

Saudi Arabia: Saudi Arabia hired Deaver to help on arms sales and trade matters. When the publicity surrounding Deaver's lobbying erupted, Saudi Ambassador Prince Bandar instructed Deaver not to do anything until matters settled down.

Fee: $500,000.[6]

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6 Deaver's staff performed support functions on a number of these contracts in addition to Deaver's own personal activities. Staff members prepared memos, "talking points," and reports, and often met with officials themselves. But the real work was done through Deaver's meetings and phone calls when Deaver used his personal relationships to get the attention of senior officials on his clients' needs.

What took place when Deaver talked to a senior Executive Branch official?

Evidently very little of substance. What was important was not arguments Deaver advanced, but his personal involvement. It required no sophisticated presentation -- all Deaver had to do was show up in person or make a personal phone call and explain his client's objective. When Deaver was concerned enough to make that effort, the rest took care of itself.

Deaver's approach was not unique. It reflected an age-old formula for Executive Branch lobbyists -- hire a person who has a special entree with the official you want to reach. That guarantees the official's personal attention and friendly consideration. It may not always produce the desired result, but it works well enough for many of the world's leading corporations to spend millions of dollars each year to get on the inside track.

A graphic example of the same cronyism principle at work was recently provided by the former Secretary of HUD, Samuel Pierce, Jr., in testimony before a House Subcommittee. The Secretary was asked what former Interior Secretary James G. Watt had done to help win a Federal rent subsidy for a real estate client. According to an account in *The New York Times* on May 26, 1989:

> "How many meetings were there with Mr. Watt?" the lawmaker asked.
>
> "I believe I had only one," Mr. Pierce replied.
>
> "Give me a wild guess," Mr. Lantos asked. "How long did that conversation last?"
>
> "It wasn't very long," the former Secretary said.
>
> Mr. Lantos: "Fifteen minutes?"
>
> "Maybe as much as 30 at the most," Mr. Pierce said.
>
> "You didn't go into any details of that project?" Mr. Lantos asked.
>
> "Whatever he said, I paid very little attention," said Mr. Pierce. "I turned over those details to the proper staff."

IV. LEGISLATIVE RECOMMENDATIONS

A. Public Disclosure of Lobbying Clients and Activities

Who first blew the whistle on Deaver's lobbying excesses?

That honor apparently belongs to two *Washington Post* staff writers, Thomas B. Edsall and David Hoffman. On October 27, 1985, the *Post* carried a front page article by Edsall and Hoffman entitled "Luring Clients." It was the first hard news story of Deaver's extraordinary success in lining up business for his lobbying firm following his departure from the White House in May. The key to the Edsall-Hoffman article was its reliance on *public filings* by Deaver's firm under the *Foreign Agents Registration Act*. The lead paragraphs in the story specifically described Deaver's retainer as a lobbyist by the Canadian Government – a fact which was disclosed in FARA filings with the Justice Department. .

It was this same October 27, 1985 *Washington Post* article which directly triggered Congressman Dingell's initial inquiry to the General Accounting Office about Deaver's activities on the acid rain issue. This led in turn to the Dingell subcommittee hearings in May 1986, when Deaver committed the perjury for which he was later convicted. The most striking fact about this chain of events is the importance of the filing and disclosure requirements of FARA.

Other investigative journalists have made good use of the information in FARA filings to keep the public informed about questionable conduct by Executive Branch lobbyists. *Washington Post* reporter Stuart Auerbach published a listing of well-connected lobbyists representing foreign interests in a lengthy article on February 16, 1986. The lead sentence in the story stressed the role of former officials and campaign aides as Executive Branch lobbyists:

> Former officials of the Reagan administration and influential Reagan-Bush campaign aides are being paid millions of dollars by foreign governments and corporations, in many cases to help those clients block or counter administration initiatives.

The first former official Auerbach named was Deaver: "The most prominent former Reagan aide representing foreign interests for large fees is Michael K. Deaver, a confidant of President Reagan and his wife, Nancy."

The *Post* reporter repeatedly identified *the FARA filings* as his source of information.

Particularly significant was the fact that in many cases the FARA filings were the *only* available source of information, since many of the lobbyists would not volunteer information about their clients:

> Deaver declined to talk about potential conflicts between his former White House job and his foreign clients. "I don't talk about my clients, either foreign or domestic," he said.

It can be fairly said that the Deaver disclosures and subsequent congressional hearing and grand jury investigation would probably never have occurred if it had not been for two factors:

1. The requirement for lobbyists to register their retainer agreements with foreign clients at the Justice Department under the Foreign Agents Registration Act.
2. The enterprising work of journalists in reviewing those FARA filings and using them to alert the public.

What is noteworthy, however, is that there is no equivalent requirement to disclose contracts to lobby for domestic clients. The *only* way such information can now be obtained is through voluntary disclosures by the parties -- a rare event -- or through congressional or grand jury investigations, a costly and cumbersome process.

The single most important result that could come out of the Deaver case would be enactment of legislation to require the disclosure of *all* high-fee lobbying contracts aimed at the Executive Branch. The Foreign Agents Registration Act has proven itself an excellent model for what the legislation should provide. With suitable modification it could be extended to cover domestic clients with equal effectiveness.

B. Testimony About Lobbying by Foreign Governments

Executive Branch lobbying for foreign interests is a growth industry in Washington, D.C. A feature article in the *Washington Post* on June 19, 1989 by Pat Choate reported that 152 Japanese companies and government agencies had hired 113 Washington firm for representation in 1988. The most prominent foreign interest after Japan was Canada, with 61 representatives, followed by Great Britain with 41.

The article noted that "since 1980, more than 100 former federal office- holders have joined the ranks of many others who once held important U.S. positions and now advise or speak for foreign companies and their governments." These former officials included "18 senior presidential aides, six senators, 10 congressmen and four top-level military officers".

The use of former Federal officials by foreign *governments* to lobby the Executive Branch presents a special problem that deserves legislative attention: the ability of foreign officials to use the cloak of "diplomatic immunity" to block investigations and prosecutions for violations of U.S. criminal laws by their Washington lobbyists. The Deaver case offers a good example of how this can happen.

Count Four of the indictment filed against Deaver charged him with lying about the extensive discussions he had while he

was Deputy Chief of Staff with representatives of the Canadian Government concerning the acid rain issue prior to the 1985 U.S.-Canadian Summit meeting. This charge was based primarily upon written statements supplied by Canadian Ambassador Allan Gotlieb through diplomatic channels at the request of the Independent Counsel. At the time, Gotlieb and his superiors were under sharp attack in the Canadian Parliament for the Government's dealings with Deaver, and the opposition party was demanding a Parliamentary inquiry into the matter. Cooperating with the U.S. investigation offered an opportunity to deflect a legislative inquiry at home.

Ambassador Gotlieb discussed the acid rain issue with Deaver face-to-face on at least four separate occasions while Deaver was still on the White House staff: On December 11 and 17, 1984, and January 5 and 31, 1985. During his grand jury appearance, Deaver denied participating in any discussions of the issue during this period. He specifically denied having lunch with Ambassador Gotlieb in January 1985, or telling Gotlieb that he (Deaver) had discussed the question of an acid rain special envoy with Secretary of State George Shultz. Gotlieb's written statement (which could not be used at trial because of court rules of evidence) proved that Deaver was lying.

The Independent Counsel requested the Canadian Ambassador to appear voluntarily to repeat his earlier statements in person to the trial jury. Gotlieb at first said he would consider testifying, but later sent word through a Washington law firm that the Canadian Government would not let him appear. The Independent Counsel then applied to the District Court for a subpoena to require Gotlieb to appear. The State Department, the Justice Department, and Deaver's lawyers all opposed the application. A spokesman for the Department of Justice initiated a media campaign against the Independent Counsel, charging a violation of an agreement to make all Canadian contacts through diplomatic channels (a charge which he later admitted was false).

The Independent Counsel argued to the court that diplomatic immunity was like any other evidentiary immunity -- once it was waived by the earlier voluntary statements (that had been part of the basis for Count Four of the indictment) it was waived

forever. Waiver may not be qualified, he urged, just as a waiver of the attorney-client privilege or of the privilege against self-incrimination may not be qualified. The Independent Counsel's argument was that once the Ambassador's statement was submitted to the Deaver grand jury, such a privilege was waived in the Deaver case for all purposes. The District Court declined to accept this position, however, and ruled that the Canadian Government and Gotlieb were allowed to restrict their waiver. Whatever the merits on the legal issue of waiver, the result of Gotlieb's refusal to testify was clear: it was the major factor in Deaver's acquittal on Count Four of the perjury indictment.

An important issue of public policy is presented by this incident: Can foreign governments hire ex-officials as lobbyists and then refuse to give evidence (which any domestic client must give) when the lobbyists' conduct *on behalf of that client* is called into question in a criminal prosecution?

The Government of Canada was no mere bystander. Ambassador Gotlieb met with Deaver to discuss representing Canada less than a week after he left the White House in May 1985. Another Canadian official earlier suggested to Deaver that Canada might be interested in hiring Deaver after he left office. Moreover, Canada engaged Deaver to represent it on the identical issue Gotlieb had earlier discussed with him as a public official in the White House. With all due respect to the sovereignty of Canada, no lobbying client should be permitted to obstruct the subsequent prosecution of its own lobbyist for lying about their relationship or for violating substantive U.S. law. In light of this experience, Congress should consider restrictions on U.S. lobbyists' activities on behalf of foreign governments. Specifically, Congress might consider outlawing lobbying for foreign governments by former Federal officials unless an executed waiver of diplomatic immunity as to the lobbyist's activities is filed with the lobbyist's FARA registration statement, as we recommended to the Judiciary Committees in December, 1987.

V. CONCLUSION

The Michael Deaver case revealed the tip of an iceberg -- a small outcrop of Washington's secret government, where special favors are traded based on who you know.

The basic philosophy of democratic government is that official decisions should be made strictly on the merits. Under democratic principles, all citizens are supposed to be able to deal with government on an equal footing -- a crucial cornerstone of democratic society when our government has become a major dispenser of funds, and when every segment of society must compete for a fair distribution of the benefits of public funds and the burdens of public taxation. Democracy becomes corrupted when one segment of society can obtain special benefits and dispensations through secret access to government decision-makers.

The real issue raised by the Deaver case is not the narrow question of *when* an insider should begin lobbying the Executive Branch for special favors, but why secret lobbying should be allowed to be carried on at all.

Of course, not all lobbying is bad. Indeed, in some cases lobbying is the only way a perfectly legitimate organization can overcome bureaucratic misinformation, neglect, myopia or animosity. If the cause is legitimate, however, why does it need to be presented in secret? Why do ex-White House aides need to use White House passes to present legitimate cases?

Secrecy in government breeds abuse in government. When people believe that no one is watching, they are capable of conduct and decisions they would never attempt in the open.

The concept of open government is founded on long popular distrust of quiet deals and secret bargains. What may be appropriate to private business is not acceptable in a representative government.

The Biblical admonition "And ye shall know the truth and the truth shall make you free" could well be the motto for democracy. Truth is the fodder of freedom. Citizens make decisions based on what they know. In a democracy they are entitled to know exactly *what* their government leaders are doing and *why*.

At present there are *no* disclosure requirements for private lobbying of the Executive Branch by domestic interests. Defense contractors can influence awarding of contracts involving billions of dollars of tax money with no one being the wiser. Regulated industries can use the back stairs to make presentations to their regulators. Investment bankers, transportation corporations, minority businesses, professional associations, real estate developers – almost anyone who has a substantial stake in Federal policy – can hire a lobbyist whose stock-in-trade is *who* he or she can see privately to make a secret approach to government officials for special consideration. There is simply no requirement to tell anyone what takes place.

A few administrators do take precautions to minimize lobbyist abuses – through sign-in registers, attendance of extra staff people as observers at meetings, post-meeting memos to the file, detailed appointment and telephone records, and the like – but this is the exception rather than the rule. Too many administrators, enjoying their power and prestige, wheel and deal with lobbyists inside and outside their offices, never keeping records, and exhibiting convenient memory lapses when questions are asked.

Influence peddling is not the same as bribery. The process is much more genteel, but the results are usually the same. Government officials tip the scales to help their friends earn

money in their private lobbying firms. This can be done as indirectly as by providing advance information about an upcoming government decision, or as directly as deciding a close question in favor of the lobbyist's client. Often the "close question" involves deciding between the private interest of the client represented by the friendly spokesperson (authorizing construction, preserving a tax break, approving a merger) and the public interest (protecting the environment, spreading the tax load, encouraging price competition), which may have no spokesperson at all.

The evils in this practice are not so much who does the lobbying, but the lack of public information about what lobbying is taking place. In a sense, the uproar over Deaver's lobbying activities after he left the White House was based on a feeling of unfair competition on the part of other lobbyists who were doing exactly the same things but with less "clout." Legislation to tighten up the "cooling off period" before an ex-official can begin lobbying is in one sense a "Lobbyists' Protection Bill" whose effect is to guarantee that lobbyists who already have special access to the Executive Branch are not put out of business by newcomers who may have even better access. Such legislation does not address the underlying problem, the secret lobbying itself.

One remedy is simple and self-evident: public disclosure. Let in the sunlight. Make records of high-fee lobbying activity open to the public. Encourage an inquiring press. End government decision-making by secret deals behind closed doors.

On the day following the jury's conviction of Michael K. Deaver for lying about his Executive Branch lobbying activities, the Independent Counsel issued a public statement about the significance of that conviction. The statement produced expressions of rage from the White House and sarcasm from some newspaper editors, but it is just as valid today as it was in December 1987:

> The jury's verdict is the most eloquent statement that can be made about the Deaver case.
>
> But the successful outcome of the Deaver trial should not be mistaken as a resolution of the more serious problem which

brought about the appointment of an Independent Counsel in the first place.

That problem is too much "loose" money and too little concern in Washington about ethics in government.

Vast sums of money are on call to representatives of major corporations, defense contractors, and foreign governments to buy influence and favors. Much of that money is paid to "consultants" whose stock in trade is their friendship with persons in high office. Washington money men will continue to undermine public confidence in government until lawmakers, business and community leaders, and individual citizens decide to cry "enough."

The Congress of the United States is the only force that can effectively cry "enough" to the unbridled lobbying of the Executive Branch of the Federal government. If some such measures are not taken soon, business interests and foreign governments will increasingly manipulate the policies of the Executive Branch of our national government, and special interest will replace public interest as government's primary goal.

Respectfully submitted,

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